QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period:
From January 1, 1937
Through March 31, 1937
VOL. VI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1937 through March 31, 1937.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

The Office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
A. A. CARMICHAEL,
Attorney General.

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OPINIONS

January 5, 1937

Hon. F. T. Hodges,
Tax Assessor,
Henry County,
Abbeville, Alabama.

Tax Assessors—Book of assessments, abstract—

1. Tax Assessor of Henry County authorized to permanently bind original assessment sheets as authorized by Section 55 of the 1935 Revenue Act which when bound constitutes the Book of Assessments.

2. Tax Assessor required to make abstracts required by Sections 57 and 58 of the 1935 Revenue Act.

3. Section 2 of Act No. 346 approved November 9, 1932 (Local Acts 1932, page 124) held repealed by 1935 Revenue Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 11, 1936, in which you state:

"It is provided in Section 58, Page 31, Revenue Bill, House 324, Regular Session 1935, that after the book of assesments has been completed as therein provided, the Tax Assessor must enter in a book in concise form, the amount of taxes assessed against each tax payer, * * * etc etc and that said book must be turned over to the Collector not later than September 15th; it is also provided in said section that for services in the preparation of said book the Assessor **shall** be paid certain fees as per schedule provided in said section, and that these fees shall be paid to him by Court of County Commissioners, Board of Revenue or other governing body of like jurisdiction.

"In Local Act, Extra Session 1932, page 124, House 691, Glover (Henry), it is provided in Section One thereof:—

"That lists or sheets whereon are entered property for ad valorem taxation in Henry County, Alabama, shall, by the Assessor, be substantially bound alphabetically by beats and labeled accordingly and to serve for all purposes in lieu of book of assessments upon which such assessments from said lists or sheets are required by the general laws of said State to be transcribed and thereby abandon in said County the preparation, use and expense of said book.

"It is further provided in Section Two of said local act:—That from said bound lists or sheets and alphabetical recapitulation by beats shall, by Assessor, be made in book form as a permanent record showing names of tax payers, totals of items of property valuation thereof and taxes thereon, and from which receipts for collections of taxes, shall by Collector, be issued and thereby save expense of abstract.

"Am requesting your opinion as follows:

"1—Does the local act as above mentioned abandon both book of assessments and Tax Abstract for collector, in Henry County, Alabama?

"2—Under local act above quoted, is Assessor required to prepare and complete Tax Abstract as provided in Revenue Bill Sec. 58 as above quoted?

"3—If Assessor be required to make and complete Tax Abstract for Collector and for State Tax Commission as provided in said Section 58, must the Court of County Commissioners of Henry County, Alabama, compensate Assessor for his services therefor as per schedule of fees as provided in Section 58, Revenue Bill above quoted.

"4—If Local Act above mentioned abandons Tax Abstract Book for Collector and State Tax Commission in Henry County, Alabama, can State Tax Commission compel Assessor to prepare Tax Abstract book as provided for in Section 58 Revenue Bill above quoted, without compensation therefor."

I have given careful consideration to the Local Act to which you call attention.

Section 1 of your Local Act attempts to relieve Tax Assessors of making the book assessments required by Section 42, Acts 1923, page 152, by providing that the bound assessment sheets shall be used in lieu of such book of assessments. This act was approved on November 9, 1932.

Shortly prior to that Act No. 83 approved Oct. 11, 1932 (General Acts 1932, page 93) had been passed, relieving all assessors of such duty, and providing that the original assessment sheets, permanently bound, should constitute the book of assessments, except where local laws otherwise provide. This act covered the entire subject matter of Section 1 of the Local Act.

It is certainly questionable if this portion of the act does not contravene Section 105 of the Constitution.

However that may be, the end sought is effectively achieved by the General Act, and this is preserved by Section 55 of the 1935 Revenue Act.

See opinion to G. B. Smith, Tax Assessor, Elmore County, Quarterly Report, Vol. III, page 75, copy of which is enclosed herewith.

You, therefore, are not required to make the book of assessments in the regular way, but in lieu, are required to "arrange in alphabetical order original assessment lists, and cause the same to be permanently bound and such assessment lists when bound **shall constitute the book of assessments.**"

Section 2 of said Local Act attempts to relieve the assessor of making the abstract for the collector required by Section 45, Acts 1923, page 152, and possibly by inference attempts to relieve him of making the abstract required by Section 44 of said 1923 Act.

Constitution 104 (15) says:

"Sec. 104. The legislature shall not pass a special, private or local law in any of the following cases:

"(15) Regulating either the assessment or collection of taxes, except in connection with the readjustment, renewal or extension of existing municipal indebtedness created prior to the ratification of the constitution of eighteen hundred and seventy-five."

This Local Act relates to the subject specified by Section 104 (15) of the Constitution and hence is doubtful of validity.

However, by the General Revenue Act of 1935, Section 57 requires the making of the abstract for the Tax Commission and Section 58 requires the making the abstract for the collector.

The Act of 1935 is a complete treatment of the subject matter and in my judgment operates as a repeal of local acts in conflict therewith.

By Section 411 all laws or parts of laws in conflict with the provisions of this act, are repealed.

It is, therefore, my conclusion that Section 2 of the Local Act is repealed, irrespective of its validity when passed, and you, as Tax Assessor, are required to make the abstracts required by Section 57 and 58 of the 1935 Revenue Act. Opinion to P. G. Lawley, Tax Assessor, Fayette County, dated Jan. 5, 1937, copy of which is enclosed herewith.

As compensation is authorized by Section 58, it follows that if the Tax Assessor completes the abstract thereby required to be made by the time required, he is entitled to the compensation therein provided.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1937

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Commissioners Courts—

1. Member of County Commission acting as Chairman Pro Tem and signing County warrants is subject to same personal liability for payment of illegal claim as if the regularly elected Chairman.

2. Office of Chairman not vacated by temporary illness, and payment of regular salary fixed by statute during absence by reason thereof, in absence of removal of office for incompetency, it not illegal expenditure of County funds.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of August 19th, which is as follows:

"The Court of County Commissioners of Madison County, Alabama, as created by Local Acts approved 2-3-23, page 3 and 9-20-30, page 216 (Local Acts 1923) and as amended by Local Acts 1927, 1931, and 1932, passed resolutions as follows:

"'July 16th, 1934, Whereas, Mr. E. T. Terry, Chairman is expected to be absent from the City for two or three weeks, Therefore,

be it resolved that J. Proctor Smith, be and he is hereby authorized to act as Chairman, Pro Tem, of the Board and to issue the County's warrants in payment of its bills, in the absence of Mr. Terry. February 4th, 1935, Whereas, Mr. E. T. Terry, Chairman, is away on leave of absence, therefore, be it resolved that J. Proctor Smith be and he is hereby authorized to act as Chairman Pro Tem, of the Board and to issue the County's warrants in payment of its bills, in the absence of Mr. Terry and until further orders of the Board.'

"Under the first resolution Mr. Smith signed no county warrants in payment of claims against the County and under the second resolution all warrants in payment of claims were signed by Mr. Smith from Feb. 4th, 1935, to Dec. 16th, 1935 at which time Mr. Terry's successor was appointed and qualified, Mr. Terry having been absent from February 4th to date of his death on December 5, 1935. According to information obtainable Mr. Terry was away from his duties a considerable part of 1934 and performed none of his duties, as set out by Section 8 of Act creating said Board from February 4th, 1935, to date of his death.

"Taking into consideration the above will you please advise me as follows:

"1. In the event any warrant signed by Mr. Smith, as Chairman Pro Tem, was in payment of an illegal claim against the County, would such item be a charge against Mr. Smith and his bond?

"2. Did the act on of the Board on February 4th, 1935, and Mr. Terry's failure to perform the duties as set out in Section 8 have the effect of an abandonment of the office of Chairman by Mr. Terry?

"3. In the event your answer to question 1 is in the negative, would any warrant signed by Mr. Smith in payment of an illegal claim against the County be a charge against Mr. Terry and his bond?

"4. In the event your answer to question 1 is in the affirmative would any amount paid to Mr. Terry, after February 4th, 1935, as compensation for services be a legal expenditure of County Funds?"

In addition to the general reference of the facts in your letter, I understand that Mr. J. Proctor Smith was a member of the Court of County Commissioners of Madison County, his regular term embracing all of the time inquired about, and that while acting as Chairman Pro Tem he drew only his regular compensation as an associate commissioner.

Answering your first question, it is my opinion that Mr. Smith, having acted as Chairman Pro Tem of the Court of County Commissioners, and having executed warrants for the disbursement of County Funds, would be subject to the same personal liability for the disbursement of County funds in the payment of illegal claims against the County to the same extent as he would have been had he been the regularly elected Chairman.

Answering your second question, it is my opinion that the action of the Board on February 4th, 1935, designating Mr. Smith as Chairman Pro Tem during the absence of Mr. Terry and until further order of the Board, did not have the effect of vacating the office of Chairman, then held by Mr. Terry. It is to be observed that the Chairman of the Court of County Com-

missioners, under the Acts referred to, holds office for a term of four years at a fixed annual salary, payable monthly. The fact that during a part of his term Mr. Terry was absent by reason of illness would not of itself vacate his office as Chairman. Whether or not his illness and physical condition would constitute such an incompetency as would subject him to removal for cause under Section 4497 of the Code would in large measure depend upon the particular facts. In this connection I call your attention to the following quotation from the case of State Ex Rel Attorney General v. Martin, 180 Ala. 459, at page 467, wherein the Court, quoting from State Ex rel, etc. v. Lowe, decided at the same session, said:

> "It is possible that incompetency of an official may exist by reason of either physical or mental conditions, and that it may bring detriment to the public whenever from any cause it may occur. But the law must be interpreted so as to allow it to operate reasonably, and such interpretation excludes from the term 'incompetency' all such mere temporary incapacity as ordinarily attends and is co-terminus with acute disease. The incompetency which serves for impeachment is such as characterizes the usual status of the officer and which will therefore be continuous in some degree."

The Court then laid down the further condition and limitation that the duration of the incompetency contemplated by law must be such as to indicate beyond a reasonable doubt that it will continue during the remainder of the term of the accused officer.

It therefore follows that Mr. Terry's office was not vacated in the absence of impeachment or removal proceedings prior to his death.

In reference to your third question, since your first question is answered in the affirmative, a further statement here would apear to be unnecessary.

In answer to your fourth question, since Mr. Terry's office has not been vacated during the time inquired about, payment of the regular monthly installments of his salary fixed by law was not an illegal expenditure of County Funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1937

Hon. P. G. Lawley,
Tax Assessor,
Fayette County,
Fayette, Alabama.

Tax Assessor—Where book of assessments made by permanently binding original assessment lists, as authorized by Section 55 of 1935 Revenue Act, the Tax Assessor is not relieved from other duties required by law and specifically from making abstract required in Section 57 of said Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 9, 1936, in which, after quoting Section 57 and a portion of Section 55 of the 1935 Revenue Act, your ask:

> "The question is, if we are relieved of making the 'book of assessment' and allowed to furnish the Tax Collector an abstract from the original assessment sheets, then are we required under Section 57, above set out, **when there has been no book of assessment made,** to make an itemized abstract for the State Comptroller and Tax Commission."

If you will read carefully Section 55, I think your difficulty wil be obviated. I quote, in part, and emphasize:

> "Provided that in counties where assessors are now allowed by law to use assessment lists in lieu of a book of assessments, the assessor shall not be required to prepare a book of assessments, as provided for in this section, but in lieu thereof, shall be required to arrange in alphabetical order original assessment lists, and cause the same to be permanently bound, **and such assessment lists when bound, shall constitute the book of assessments** as herein provided, and the certificate of the State Tax Commission, or the agent or assistant thereof provided for in the next section, shall be entered upon each of said bound volumes of assessments. Such assessment lists when bound shall be preserved permanently as a matter of record. In making the tax collectors' abstracts, such abstracts shall be made direct from the assessment lists."

You will note, therefore, that the assessment lists when bound "shall constitute the book of assessments."

When this method is used for preparing the **book of assessments** the other requirements of law are not changed, and as Section 57 requires the making of the abstract by the Tax Assessor, I cannot but advise you that under the specific terms of the statute, it is the duty of the Tax Assessor to make such abstract.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1937

Hon. W. G. Little,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Specified agreement which conveys no interest in real or personal property is not subject to tax under either Schedule 46 or Schedule 94, 1935 Revenue Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I am in receipt of your letter of October 14, 1936, requesting opinion as follows:

"I am herewith enclosing, by registered mail, an agreement that has been filed in my office. As I am uncertain about the amount of the tax that I should charge, or whether I should charge any at all or not I am requesting your opinion on the filing tax due on this paper."

The agreement which you enclose sets forth a contract by which Parties of the First Part guarantee repayment by Party of the Second Part of all sums advanced by a Bank named therein, up to $10,000.00. Under certain conditions, Party of the First Part may take over the indebtedness to the Bank, take possession, and forclose mortgages held by the Bank from the Party of the Second Part. All legal title to the property will be gained (if at all) through foreclosure of mortgages between Party of the Second Part and the Bank and the agreement merely relates to rights and promises between the two parties. This agreement does not purport to sell or mortgage any property either real or personal and does not convey any interest in the property.

I am of the opinion that the agreement is not taxable either as a deed or a mortgage and that the Schedules 46 and 94 of the 1935 Revenue Act do not apply.

I am returning the agreement which you enclosed with your request.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 5, 1937

Hon. Geo. D. Johnston,
Tax Assessor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Tax Assessor Tuscaloosa County Compensation from October 1, 1935 until January 1, 1936.

The Tax Assessor of Tuscaloosa County is entitled to all fees and commissions earned by him or which accrued on assessments made by him between October 1, 1935 and the date when Act No. 128, approved June 12, 1935, Local Acts 1935, page 61 became effective, less the amounts paid for clerical hire during such period.

Opinion by the Attorney General.

Dear Sir:

I have your letter requesting me to advise you as to your compensation as Tax Assessor of Tuscaloosa County between October 1, 1935 and January 1, 1936, the latter being the date on which you state the Act under the authority of the constitutional amendment placing you on a salary basis went into effect.

It is my judgment that you as Tax Assessor are entitled to your fees and commissions which actually accrued to you during the period between October 1st and January 1st if that be the date on which the Local Act placing you on a salary basis went into effect.

Under Section 23 of the 1935 Revenue Act, the Tax Assessor is allowed a maximum compensation of $5400.00 net annually, and in addition thereto an allowance is set out for clerical hire. He receives, however, the fees and commissions as provided by law and from such fees, commissions and earnings he pays the expenses as authorized by said Section 23 and a net compensation to him of $5,400.00 and the excess is paid into the County Treasury, It is to be noted, however, that this Section provides for payment on an annual basis and that there is no provision made for the Tax Assessor to be paid on a monthly basis.

This office has heretofore ruled that the fees and commissions of a Tax Assessor accrue when he actually earns same and not when the same are paid. In other words, said fees and commissions accrue when the assessments are made. Quarterly Report, Vol. 1, page 154, and opinions cited and also opinion to Chas. W. Lee, State Comptroller, dated July 7, 1936, Office Edition, Vol. 12-A.

It is therefore my opinion that for the period covered, you are entitled to be paid all commissions and fees which actually accrued to you during such period less, of course, the monthly allowance or amount actually paid clerical hire during that period.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1937

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

A veteran who is entitled to an exemption under the provisions of Act No. 494 (Acts of 1935, page 1057), who fails to take out a license making proof of his disability and carries on a business without such license, after the same has become delinquent and is cited by the license inspector is liable for all penalties and citation fees the same as if he had not been entitled to such exemption.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 1, 1936, in which you request my opinion as follows:

"Assuming that a citizen is entitled by reason of physical disability to exemption from payment of State and County licenses for the occupation he wishes to engage in, under the Act approved September 13, 1935 (Genl. Acts 1935, page 1057); but does not apply to the Probate Judge exhibiting his proofs, and requesting the issuance of his license until after November 1, when all occupational State and County licenses become delinquent:—

"Is the License Inspector entitled to have collected for his benefit, and is it the duty of the Probate Judge to collect from the applicant,

15% penalty, based on the amount the applicant would pay, if he paid the money for his license, instead of taking it under his exemption privilege?"

The Act above referred to, i. e., the Acts of 1935, page 1057, which exempts veterans of various wars from privilege licenses does not mean that they can engage in business for which a license is required without such license, but under this Act, if they desire to take advantage of this exemption, such veterans must make application to the Probate Judge or to some officer authorized to issue licenses and when so doing must furnish the judge of probate or other officer, proof of their disability as set out by Section 8 of this Act, which is as follows:

"Proof of disability shall be made by exhibiting a Federal Government rated disability certificate to an extent of twenty-five per cent or more, or an affidavit from an examining physician of the United States Veteran's Bureau showing that the applicant for license is physically disabled to the extent of at least twenty-five per cent or by the production of a pension certificate issued by the United States Government or by the State of Alabama or by a certificate of the county health officer of the county in which the veteran resides, or if there be no county health officer a certificate by a reputable physician in the county in which the veteran resides, said physician's certificate to be attested before some officer authorized to administer oath."

Whenever the Judge of Probate is satisfied under the proof submitted that such veteran is entitled to such exemptions, he may allow the same and issue licenses to said veteran to carry on the particular business, but such veteran must have a license even though he is exempt from paying the amount required for such license and if he fails to make the proof and procure such licenses before the first day of November of any year and he engages in such business he is doing business without a license and it would be the duty of the license inspector to cite him for operating such business without a license and when so cited the party delinquent is subject to all the citation fees and penalties provided by law, based of course, on the amount of said licenses. The penalty and the citation fees grow out of the fact that the party was operating a business for which a license was required without taking out said license before same had become delinquent.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937

Hon. W. R. Carothers,
County Superintendent of Education,
Perry County,
Marion, Alabama.

County Board of Education—

Under Section 132 of the School Code of 1927, as amended by Acts of 1933, page 81, County Board of Education authorized to purchase real estate without the necessity of condemnation proceedings looking to that end.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"A mortgage executed by the Union District Academy for Colored People to the Planters & Merchants Bank, Uniontown, Alabama, with between $4,000.00 and $4,500.00 due thereon, was recently foreclosed by the said Bank and the property bought in by it at foreclosure sale. The colored people of Uniontown are now without a school building and lot and the rent demanded by the Bank for said building and lot is more than the colored people are able to pay. The Bank has offered to sell the building and lot which it purchased at foreclosure sale to the County Board of Education of Perry County for the sum of $1,500.00 cash.

"Please advise me if, under Section 132 of the 1927 School Code of Alabama, as amended by the General Acts of the Extra Session of 1933, page 81, the County Board of Education of Perry County can make a direct purchase of this property from the Bank, in its name, and for public school purposes. Said Code Section, as amended by said Act, is not clear as to whether a direct purchase can be made by the County Board of Education, or whether condemnation proceedings will have to be had."

Section 132 of the School Code of 1927 as amended by Acts of 1933, page 81, provides:

"132. POWERS OF COUNTY BOARD. The County Board of Education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the Board and spread upon its minutes. All processes shall be executed by service on the executive officer of the Board."

This provision is broad enough to encompass direct purchase by the County Board of Education, without the necessity of condemnation.

If all other pertinent provisions of law are complied with, I know of no reason why the County Board of Education of Perry County cannot purchase property referred to in your letter, for County School purposes.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937

Hon. R. S. Duck,
Clerk, Circuit Court,
Bay Minette, Alabama.

1. Costs and Fees—Clerk of the County Court entitled to fee of fifteen cents per hundred words for making and certifying transcript on appeal to the Circuit Court.

2. Clerk of the Circuit Court and ex-officio clerk of the County Court are not entitled to pay for issuing warrant returnable to the County Court, under the General Laws of the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 26, 1936 in which you request my opinion as follows:

"Will you please give me an opinion on the following:

"1. The defendant was tried in the County Court, found guilty, appealed to Circuit Court and convicted there. The Convict Department has questioned my right to charge for making the transcript from County Court to Circuit Court. I have referred them to Sections 3667 and 3804 of the 1923 Code and to an opinion of the Attorney General, dated September 30, 1930, in the Biennial Report of the Attorney General from October 1, 1928 to September 30, 1930, at page 979, as my authority for charging this item.

2. The Convict Department has questioned my right to charge 50c for issuing a warrant in County Court. My authority for making this charge is Section 3667 and 3804 of the 1923 Code, together with the ruling of the Attorney General dated May 11, 1933, found in the Biennial Report of the Attorney General from October 1, 1932 to September 30, 1934, at page 226."

Answering your first request under the authority of two opinions written by this office on June 10, 1935, to Hon. Hamp Draper, Associate Member, Board of Administration, Office Edition, Vol. 5-A, page 76 and again on July 10, 1935 to Hon. G. C. Grantham, Clerk of the Circuit Court, Geneva County, Book 5-A, page 96, I hold that you are entitled to this charge, that is, fifteen cents per hundred words for making transcript where defendant is convicted in the County Court and appeals to the Circuit Court. See Section 3667, Code of Alabama, 1923, where it says:

"Making transcript and certificate thereof (Per hundred words), fifteen cents."

Answering your second request, this depends on whether or not you are operating under the General Law as Clerk of the County Court, or whether you are operating under a local law which gives to you the authority to issue warrants and affidavits in the County Court and I am unable to find such local law for your County, therefore, I am presuming you operate under the General Laws and under such laws, you, as Clerk of the Circuit Court and ex-officio Clerk of the County Court, are without authority to issue such warrants as under the General Law, the Judge of the County Court or Justice of the Peace must issue such warrants. See Section 3815, Code of Alabama, 1923, therefore, you, as such clerk, not having authority to issue the same, of course, could not be paid for so issuing. Biennial Report of the Attorney General, 1918-1920, page 287.

This opinion is not in conflict with the opinion of this office to which you refer, of May 11, 1933, Biennial Report of Attorney General, 1932-34, page 226, as the opinion supra refers to the powers and duties of the Clerk of the Circuit Court and not to the Circuit Clerk as ex-officio clerk of the County Court.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937

Hon. Frank O. Deese,
Judge of Probate,
Ozark, Alabama.

1. There is no authortity of law for the County to pay for the use of a fingerprint expert in an effort to detect and run down the offender who has broken into and has stolen money from the office of the Judge of Probate.

2. If the Probate Judge has used due diligence in safeguarding money which he has received for the State or County, and has not defaulted as to the time in which he is required to transmit the same to the State or County, and it is the same money that he collected, belonging to any certain fund of State or County, then he could not be liable in case of robbery. On the other hand if he has not used due diligence in safeguarding the money and it is not the same money collected, then he would be liable in case of theft from his office.

Opinion by Assistant Attorney General Haynes:

Dear Sir:

I have your letter of November 25, 1936, in which you request my opinion as follows:

"On last Monday, November 23, while the office force was out to lunch at the noon hour, someone entered the probate office here, forced the outer door to the safe in the office, broke the inner door, tore out the steel cash drawer and took therefrom about $200.00 in cash belonging to the county and state.

"In an effort to apprehend the guilty party or parties I employed the services of fingerprint experts.

"I would like to know whether the charge of these experts for their services may be considered a legitimate charge against the general funds of the county, or whether I must pay it personally.

"Also, please advise whether I may be held responsible for the above loss, after I had used all reasonable safeguards to protect it."

Answering your first request, I find no authority of law that would authorize the County to pay for this service. The Commissioners Court or Boards of Revenue or other like governing body of the various counties of Alabama have no inherent or constitutional powers. Whatever power it has must be derived from statutory enactment. Therefore, if there is no statute or construction of a statute authorizing the payment of the claim, it can not be paid. **Weakley et al v. Henry, County Treasurer,** 86 So. 46; **Mobile County v. Williams,** 180 Ala. 639.

As to your second request, it is hard to say as to your liability on account of such burglary or theft. If, however, in the discharge of your official duties and in your official capacity as Judge of Probate, you exercise the highest degree of care, diligence, and vigilance to prevent loss and you are robbed of public monies by irresistible force, which you could not have foreseen or guarded against, this would constitute a good defense to an action on your official

bond; but if the money of which you were robbed was not the same money which you had collected or if you have committed an official default by failure to pay the money into the treasury as the law requires, such robbery would be no defense. **State v. Huston,** 78 Ala. 576.

This office has heretofore ruled on a very similar question holding that the Probate Judge of Tuscaloosa County was not personally liable for county monies stolen when the loss was not in any way contributed to by his negligence or otherwise. **Biennial Report, Attorney General,** 1930-1932, page 560.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937

Hon. James C. Brown,
Register, Circuit Court,
Tuscaloosa County,
Tuscaloosa, Alabama.

All fees including seizure fees in prohibition cases when the seizure is made by the sheriff or any of his salaried deputies, must go into the County Treasury of Tuscaloosa County, under Section 8 of an Act approved April 10, 1936, Local Acts, 1936, page 53.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 27, 1936 in which you request my opinion as follows:

"Heretofore before our Sheriff was placed on a salary, we understood the law required the Register in Contraband Automobiles, to pay the officers seizing same, the seizure fee, witness fee (to such one testifying) and after deduction of all costs including such seizure and witness fees, to pay one-fourth (¼) of the remaining amount to said seizing officers—not to the sheriff but direct to the seizure officers.

"Now, since our Sheriff has been placed on a salary, is it proper for the Register to turn all of the fees referred to above over to the Sheriff and the Sheriff to then return same to the County Treasury, or is it still legal to turn such fees over to the seizure officers the same as we did prior to the Sheriff being placed on salary?

"I have been informed that notwithstanding the fact, that the Sheriff in Jefferson County, Alabama, is on a salary basis as well as a number of other counties, that such fees are turned over to the seizure officers.

"We would greatly appreciate a ruling from you at the earliest possible moment as we have funds on hand from this source and don't know how to dispose of same."

The Sheriff of Tuscaloosa County was put on a salary by an Act of the Legislature approved April 10, 1936, Local Acts, Extra Session, 1936, page 53, and said Act fixes the Sheriff's salary and provides for its payment out of

the County Treasury. It also provides for a certain number of deputies and fixes the salary of each, all of which is payable out of the County Treasury. It further provides that the number of deputies may be increased by the Board of Revenue, whenever, in its judgment, necessity demands and it can fix the compensation of same. Section 8 of said Act provides as follows:

> "Section 8. That when this Act goes into effect said Sheriff shall continue to collect all legal charges, costs, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall pay the same into the County Treasury on the first Monday of each month after this Act becomes effective."

Section 10 of this Act provides for an appropriation out of the Treasury of Tuscaloosa County on the third Monday in January of each year and amounts sufficient for the upkeep of the office, this, in addition to all salaries. Section 8 quoted above provides that all legal charges, costs, fees and compensation and allowances heretofore or hereafter authorized to be collected by the Sheriff, shall by him be collected and paid into the County Treasury on the first Monday of each month after this Act becomes effective. Section 4782, Code of Alabama, 1923, provides as follows:

> "4782. Proceeds of sale of contraband or forfeited property; distribution and disposition of funds.—The proceeds of the sale of such property forfeited to the State, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the cost of seizure and of keeping the property pending the proceedings, shall be applied as follows: one-fourth to the officer making the seizure and furnishing the proof, but if proof be furnished by another person than the officer making the seizure, one-eighth of the proceeds shall go to the furnisher of the proof and one-eighth to the officer making the seizure and assisting in the condemnation case, or who makes the sale under advertisement. The remainder of the proceeds shall be paid into the treasury of the state as a law enforcement fund to be used and applied for the enforcement of state laws under the supervision and control of the governor, same to be paid out on warrant of the auditor on a bill against the state approved by the attorney general and governor."

You will note from the above quoted Section that in the seizure of personal property of any description illegally used for transporting prohibited liquors in the State when sold under decree of condemnation, the proceeds shall go, after paying certain other expenses named in the statute; one-fourth to the officer making the seizure and furnishing the proof. The word officer as used above includes the sheriff or any deputy sheriff of Tuscaloosa County who are on a salary and this fee or commission becomes a part of the fees, commissions, allowances or compensation of the Sheriff of Tuscaloosa County and under the setup we now have in Tuscaloosa County, must go into the County Treasury from which the Sheriff and all his deputies draw their salaries. See opinion of Attorney General, Office Edition, Book 3-A, page 62. However, if you have deputies who are not on a salary, this fee would go to this deputy when the seizure was made by him. Quarterly Report of Attorney General, Volume 4, page 154.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Instrument executed for the purpose of perfecting a title does not require deed tax.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of recent date inquiring as to whether or not a certain instrument that you enclose in your letter requires a deed tax.

I have carefully examined the said instrument and in my opinion it is merely a conveyance of property which was mortgaged and which by the defeasance clause of the mortgage was to revert to the mortgagor upon payment of the debt. In view of these facts, I am of the opinion that no deed tax should be charged as the reconveyance is merely for the purpose of perfecting title.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937

Hon. J. F. Smith,
Clerk, Circuit Court,
Escambia County,
Brewton, Alabama.

The fee of 25c in the Bill of Cost for a committing magistrate is a proper charge where it is included in Section 3753, Code of Alabama but if the cost of the preliminary is paid by the State it cannot exceed $5.00.

Where persons employed by the State of Alabama are summoned to appear before a grand jury of the State, they are entitled to their compensation, i. e., their per diem and mileage.

Where two defendants are jointly indicted and sentenced to the penitentiary, separately and severally, the clerk would be entitled to 25c for sentence of each defendant.

Where a defendant is charged with a felony and is arrested under a warrant, charging a felony and is later convicted of a misdemeanor under said charge, the Sheriff would be entitled to $4.00, the amount provided for the arresting of a felon.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 30, 1936, in which you request my opinion as follows:

"Please give me your opinion on the following:

'1st. In felony cases where a defendant has been arrested on a warrant sworn out by a Justice of the Peace and committed to jail pending action of the Grand Jury and is later on indicted by the Grand Jury, tried and convicted in the Circuit Court and sentenced to the penitentiary; would a charge of 25c in the bill of cost for the committing magistrate be a proper charge against the State Convict Department?

"2nd. Where persons employed by the State of Alabama are summoned to appear before the Grand Jury and courts of conviction, is it a proper charge against the Convict Department for their attendance as such witness? In event they are entitled to make a charge for such attendance, should they be allowed a per diem and mileage?

"3rd. Where two defendants are jointly indicted and sentenced to the penitentiary, each defendant being sentenced separately and severally, would a charge of 25c for the sentence of each defendant be a proper charge against the Convict Department?

"4th. Where, for instance, a defendant is indicted for a felony such as forgery in the second degree and said defendant is tried in the Circuit Court and found guilty of forgery in the third degree and sentenced to hard labor for the county, would the sheriff be entitled to a charge of $4.00 for a felony arrest payable from the Convict Department, or would he be only entitled to a $2.00 arrest for a misdemeanor?"

Answering your first inquiry, I am frank to say I do not know from your request just what the twenty-five cent fee you refer to includes; if it is for "complaint made before him or for each bond or undertaking of witnesses or for issuing each subpoena or notice or for an order to commitment to jail or for order of continuance or for execution for cost," my answer would be in the affirmative. Of course the cost of the court, i. e., the cost of the preliminary hearing if paid by the State cannot exceed Five dollars ($5.00). See Section 3667 Code of Alabama, 1923.

Answering your second request I refer you to an opinion of this office written April 10, 1936, to Hon. Chas. W. Lee, State Comptroller, Vol. 3, Quarterly Report, Attorney General, page 35; also an opinion to Hon. Walter K. McAdory, Chief of Alabama Highway Patrol, under date of July 9, 1936, Quarterly Report of Attorney General, Vol. 4, page 23. These opinions answer this part of your request.

Answering your third request, my answer is in the affirmative. I call your attention to Section 3739, Code of Alabama, 1923. This Section has to do with fees of clerks of the circuit courts and says in part:

"For entering sentences against each defendant, 25c"

Answering your fourth request, the sheriff would be entitled to $4.00. See opinion of this office, written February 7, 1936, to Hon. Chas. W. Lee, State Comptroller, Vol. 2, Quarterly Report of the Attorney General, page 118, question 29.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 7, 1937.

Hon. J. C. Pattillo,
Clerk of the Circuit Court,
Clanton, Alabama.

1. Where a convict is sentenced to hard labor for the fine and cost and the cost is paid to the officers and witnesses under Section 3667, Code of Alabama of 1923, and the defendant later pays the cost, the same must remain in the State Treasury to the credit of the Convict Department.

2. The Clerk is entitled to commissions on all monies transmitted to the State.

3. Where money is paid to the County Treasury that should go to the State, said payment being made by mistake or through a misinterpretation of the law, this money should be returned to the Clerk and the same transmitted to the proper custodian.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 20, 1936, in which you request my opinion as follows:

"Please render me your official opinion on the following statement of facts:

"Will Kennedy was convicted in the Circuit Court of Chilton County, Alabama, for the offense of violating the Prohibition Law and was fined $50.00 and costs of court, besides additional hard labor of six months imposed by the Court. No part of the fine and costs was paid and the defendant duly sentenced to twenty days for the fine, sixty-seven days for the costs and the six months additional hard labor, a total of six months and 87 days. On December 12, 1935, said defendant began serving and served until January 9, 1936. On January 9, 1936 a friend of the defendant paid to me, as Clerk of the Circuit Court, the full amount of the costs in this case, the same being $49.85, and I am informed that this information was conveyed to the Governor and this defendant was paroled.

"Under Section No. 5518 of the Code of 1923, I disbursed to the State Treasurer, the solicitor's fee of $30.00, less my 5% commissions, and also under the law, I disbursed to the State Treasurer and the County Treasurer, each, one-half respectively of the trial tax, less my 5% commissions, and also disbursed to myself and to the sheriff the respective clerk and sheriff fees and to the witnesses the witness fees due. After disbursing the cost in this manner the State mailed me a check for $11.55, in payment of or refunding court costs under Section No. 3667 of the Code and I mailed to the State Board of Administration my check for this amount. It is the contention of the State Board of Administration that they are entitled to all of the court costs in this case and it is my contention under the law, that it is my duty to disburse this in the way the law says I must, as I have referred to above. The State Board of Administration refers me to 1928-1930 Opinions of the Attorney General, page 537, as authority to pay them all the costs in this case.

"It will be observed from the above state of facts that the defendant served something less than one month at hard labor, and as to whether this time he served will be given credit toward the costs or fine, I am not informed, but in any event he has not served sufficient time to pay the costs which was sixty-seven days.

"The first question I would like for you to advise me, is whether or not under the law and under the above facts, it is my duty to pay the solicitor's fee to the State Treasurer, as provided by Section No. 5518 and one-half of the trial tax each to the State and County Treasurers, as the statute provides and the Clerk's, Sheriff's and witness' fees to the respective parties, or to pay all of this cost to the State Board of Administration.

"If you hold that it is my duty to pay this cost to the State Board of Administration, then will you please advise me whether or not I am entitled to deduct 5% commission from the solicitor's fee and trial tax as the law provided when the same is paid to the State and County Treasurers.

"If you hold that this money should have been remitted to the State Board of Administration, then will you please advise me if the State and County Treasurers will be authorized under the law to pay back to me this money so paid to them?

"As to my authority in receiving the money, I refer you to the case of State v. Jordan, 23 Ala. App. 127, 122 So. 185."

Answering your first request, it is my opinion, and this office has so held, that if the defendant is sentenced to hard labor to pay fine and cost and the State has paid the cost under Section 3667, Code of Alabama, 1923, and the defendant has been delivered to the State and has begun his service, then, if the defendant comes in and pays the cost, this cost goes to the State Treasury and is placed to the credit of the Convict Department. Quarterly Report of Attorney General, Volume 3, page 188. I am enclosing you a copy of this opinion.

Answering your second inquiry as to your commissions when transmitting money to the State, I call your attention to the General Acts of 1931, page 669 Code Supplement, 1936, Michie, Sec. 7278 (1)) which is as follows:

"Section 7278 (1) FEES OF CLERK AND REGISTER FOR COLLECTION OF MONEY.—The Clerks and registers of the several circuit courts of the State of Alabama shall receive five per cent of any sum or sums collected by such clerk or register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

I think under the above section you are entitled to your commissions on all moneys transmitted by you to the State or any department of the State.

Answering your third request it is my opinion if you have paid this money to the County Treasury through mistake or misinterpretation of law that the County Treasurer is authorized to reimburse you so that the money may be sent to the proper custodian.

Extended September 2, 1936.

In order to clear up some items of cost referred to in the above opinion, which appears in Quarterly Report of the Attorney General, Volume IV, page 144, I am extending the same. In my answer to your first request where the opinion says "* * * then if the defendant comes in and pays the **cost** the **cost** goes to the State Treasury", of course, this could mean only such cost as is taxable against the defendant on conviction, that is, the cost incurred by the State in prosecuting the case; and under no conditions could this include the cost incurred by the defendant in making his defense, in other words, the "defendant's" cost. The defendant's cost when collected goes to the officers and defendant's witnesses and is never paid to the State, County or Convict Department. See opinion of Attorney General, Book 13-A dated August 14, 1936, addressed to Hon. J. E. Corbin, Deputy Clerk, Marshall County. Again, where the above opinion says "this cost should be paid to the State Treasurer and credited to the convict department," this does not include the trial tax but only the cost; trial tax is not a part of the cost of the prosecution but is a tax imposed on each and every case that goes on the docket of the Circuit Court and this tax should, under all conditions, be distributed as is directed by Section 9 of the Revenue Law of Alabama, 1935, page 11, which is as follows:

> "Section 9. A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: One-half (½) thereof into the general fund of the State Treasurer, and the other one half (½) into the general funds of the county in which the same is collected and for collecting and remitting such tax, the clerk or register may retain five per cent (5%) commission thereof. In all counties in this State where the clerk or register is paid on a salary basis under constitutional authority the five per cent (5%) commission provided for by this Act shall not be collected, but such clerk or register shall pay to the State and county respectively, each one-half of such trial tax."

The above section being a part of the Revenue Law of the State shows clearly that this item is not an item of cost but is a tax or revenue matter. Quarterly Report of Attorney General, Vol. 3, page 213.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 14, 1937.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Contractors allowed reasonable time for acceptance of contract by Governor to procure license required by 1935 Revenue Act, Schedule 42, Section 348, (General Acts 1935, p. 45).

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 30, 1936, in which you request my opinion as follows:

"A New Orleans firm of contractors has secured a contract to build the overhead bridge in Evergreen over the Louisville & Nashville Railroad on U. S. Highway No. 31. This contract was let recently and the contractors have not begun work, not even as much as to move their machinery here.

"This morning I am in receipt of a copy of citation to the contractor for failing to take out license as a contractor, the citation having come through the mail and dated September 28th. At the same time I received a check from the contractor for his license as a contractor. I am reluctant to assess him the 15% penalty and ($1.50) fee for the license before beginning operations. Indeed, I had a letter from him several days ago inquiring as to the amount necessary to purchase the contractor's license.

"Will you, therefore, give me an opinion immediately as to whether this contractor is liable for the 15% penalty and ($1.50) citation fee to the license inspector, under schedule 42 page 200 of Revenue Laws of 1935?"

In reply to your letter, I wrote you under date of October 15, 1936, but upon further consideration, I desire to withdraw this letter and substitute therefor the following opinion. Also an opinion addressed to E. E. Wheelan, License Inspector of Jefferson County, under date of April 10, 1936, is modified in accordance with the following:

I am of the opinion that the contractor is not subject to a penalty under the conditions set forth by you. It is a fundamental rule in the construction of statutes that penal provisions must be strictly construed. (See 59 C. J. Section 660, page 1113, and also Alabama cases cited therein under note 22).

As the purpose of the schedule requiring contractors to be licensed is to raise revenue and not to penalize the contractors, it is my opinion that the contractors should be allowed a reasonable time after the contract is accepted by the Governor to procure his license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 15, 1937.

Hon. G. R. Lovell,
Deputy Sheriff,
St. Clair County,
Pell City, Alabama.

Fines and Forfeitures—

Fines and Forfeitures payable in script in St. Clair County as governed by Acts of 1882, page 390.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request of October 21, 1936, in which you request my opinion as follows:

"I am advised that you recently rendered an opinion that all fines are to be paid in lawful money unless otherwise provided, and I ask your opinion of the following:

"Can the Sheriff or Clerk receive script in payment of fines and forfeitures when the script has been duly issued and registered. In Acts of 1882, page 390, I am advised that a local law was passed permitting the payment of fines and forfeitures by receiving script therefor, and will appreciate it very much if you will advise me at your earliest convenience whether or not script can be still paid on fines and forfeitures in this County."

In reply I wish to advise that in my opinion Fines and Forfeitures in St. Clair County may be paid in scrip by authority of Acts 1882, page 390, Section 4, which provides as follows:

"Sec. 4. BE IT FURTHER ENACTED, That State witness tickets, payable out of the fine and forfeiture fund, solicitor's, sheriff's and clerk's claims, payable out of said fund, shall be receivable for any fines and forfeitures due to the county at the value expressed by said tickets; and officers' claims, and when the same shall be paid into the county treasury, bank, or other place of deposit, the county treasurer, or any other person acting as such, shall mark on his registry of said claims, that the same is paid, the date, and to whom."

You will observe that this Act is applicable only to St. Clair County and was, therefore, never intended to control such transactions beyond the limits of more than one political subdivision.

I wish to refer you to Section 11, Code of 1923 which provides, in part, as follows:

"This code shall not affect * * * local, private, or special statutes, and those public laws not of a general and permanent nature, and those which now relate to and can apply to but one county, one municipality or one particular district, circuit or territory * * * are not repealed by this code."

In my judgment the local Act above referred to is not repealed by any provisions of the Code of 1923 nor the adoption of the Constitution of 1901. I wish to refer you to the case of Reid v. Wallace, 168 So. 900, the court held, in part, as follows:

"It is the settled rule of this state that repeal by implication is not favored, and unless it clearly appears that such was the intention of the Legislature in passing a general statute, local acts fixing a status will not be disturbed. Shepherd v. Clements, 224 Ala. 1, 141, So. 255; Isbell v. Shelby County, 10 Ala. App. 639, 65 So. 706.

"Section 4038 of the Code of 1923 appeared in the various Codes of this State, as far back as 1876, substantially as follows: 'All fines go to the

county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; a judgment therefor must be entered in favor of the State for the use of the particular county.' This Section appears in the Code of 1923 in the following language: "All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county." The amendment to the section as it appears in the Code of 1923 does not change the ownership of fines and forefitures and is also qualified in its terms to the extent which allows express provisions with reference thereto.

"The local acts hereinabove referred to simply provide a method of payment in obligations of the county and in that respect has a field of operation independent of acts of the Legislature of 1927 amending section 4039 of the Code of 1923 providing for a disposition of a surplus arising from fines and forfeitures in the county treasury of any county over and above the sum required to pay the registered claims of the state's witnesses.

"Moreover, the act adopting the Code of 1923, approved August 17, 1923, specifically provides: 'Section 3. No statute which applies or relates or which was intended to apply or relate to but one county, one municipality, or one other political subdivision of the State, though such statute might, strictly speaking, be classed as a general law, shall be repealed or affected in any manner by the adoption of this Code or the failure to incorporate it in the Code as a part thereof; but such statute shall remain unrepealed and be given the same force and effect as if it had been incorporated in the Code as a part thereof.' Gen. Acts 1923, p. 127. So that it would appear that in the adoption of the Code of 1923, the Legislature intended to safeguard the statutes as fixed in local communities from the general repeal by implication."

It, therefore, follows that the payments of Fines and Forfeitures in St. Clair County must be governed by the above named local act.

I wish to further refer you to the case of **Barnes v. State ex rel Tate,** 162 So. 406, and to an opinion of the Attorney General under date of October 23, 1936, addressed to Hon. Fred H. Price, Clerk of Circuit Court, Autauga County, Prattville, Alabama, copy of which is enclosed for your convenience.

Premises considered, it is my judgment that the local acts here referred to has not been repealed and fines and forfeitures in St. Clair County are payable in scrip.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 18, 1937

Hon. T. M. Perry, President,
Board of Revenue,
Marengo County
Linden, Alabama.

Bonds—It is the duty of the Probate Judge to notify the appointing power when the Circuit Clerk fails to make bond as Ex Officio Clerk of the County Court.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 21, 1936, which is as follows:

"Will you kindly render me an opinion as to whether or not it is the duty of the President of the Board of Revenue or Probate Judge of Marengo County to notify the appointing power when the Circuit Clerk fails to make bond for the County Court?"

In answer to your inquiry, it is my opinion that it is the duty of the Probate Judge to notify the appointing power when the Circuit Clerk fails to make bond as Ex Officio Clerk of the County Court.

Section 3803 of the Code of 1923, provides that clerks of circuit courts are ex officio clerks of the county courts in the respective counties. Section 3805 of the Code of 1923, originally provide for the bonds of such ex officio clerks of the county courts. Same is now governed by Act No. 191 H. 343 approved April 20, 1933 (General Acts 1933 page 203.) The amount of said bond is fixed by Section 6 of said Act. Section 21 of said Act provides as follows:

"Section 21. That the bonds of all county officers and county employees as referred to in this Act, with the exception of the bond of the Judge of Probate, shall be filed and recorded in the office of the Judge of Probate, and the bond of the Judge of Probate shall be filed and recorded in the office of the Clerk of the Circuit Court, and certified copies of the bonds of the Probate Judge and Tax Assessor and Tax Collector shall be filed with the State Comptroller."

Section 2610 of the Code of 1923, provides as follows:

"Section 2610. FAILURE TO FILE BOND VACATES OFFICE.—If any officer required by law to give bond fails to file the same within the time fixed by law, he vacates his office; and in such case, it is the duty of the officer in whose office such bond is required to be filed, at once to certify such failure to the appointing power, and the vacancy must be filled as in other cases."

It will be seen from the above that it is incumbent upon the officer in whose office the bond is filed to report the failure to make same to the appointing power. It, therefore, follows in the instant case that this duty is incumbent upon the Judge of Probate as said bond is filed in his office. In this connection, I also wish to refer you to Section 2611 of the Code of 1923.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 18, 1937

Hon. D. E. Laslie,
Judge of Probate,
Macon County
Tuskegee, Alabama.

There is no filing tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 2, 1937, in which you request my opinion as follows:

"Please advise if there is a tax due on a deed made by an individual direct to the United States of America"

From your letter I am presuming that the Government is filing this deed for record, if it is, there can be no filing tax charged. I call your attention to an opinion of this office; Biennial Report of the Attorney General, 1932-1934, page 424. Where a deed is made to the United States of America and the Government files same for record, there can be no filing tax.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 18, 1937

Hon. H. L. Lazenby,
Tax Assessor,
Monroe County
Monroeville, Alabama

Taxation—Municipal Corporation—When municipal corporation adopts ordinance providing for the assessment and collection of taxes by county officers, under Section 201 of the Revenue Code of 1935, it is mandatory upon such county officials to perform the duties therein required relative to the assessment and collection of such taxes.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"There are two incorporated towns in Monroe County with population under 1500. Both town councils want me as Tax Assessor to assess town taxes along with state and county taxes, and want collector to collect same. Kindly advise me if this is compulsory for us to assess and collect town taxes."

In my opinion, when a municipal corporation has duly adopted an ordinance providing for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided for the assessment,

equalization and collection of State and County taxes, it is the duty of the County Tax Assessor and the Tax Collector to assess and collect such taxes. Section 201 of the Revenue Code of 1935 Acts, provides:

"Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and County taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one percent for assessing and one-half of one per cent for collecting."

In this connection see also United States Fidelity and Guarantee Company v. State, 165 So. 71. (Ala. Sup.).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 20, 1937

Hon. Frank M. Johnson,
Judge of Probate,
Winston County
Double Springs, Alabama

Election Registrars—Board of Registrars not entitled to compensation for illegal session held under mistake of law.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"During last April the Commissioners' Court through an error, called the Board of Registrars together to register the young voters of this county which registration was illegal, because of the fact that the date to meet in April, 1936, did not apply to the small counties like Winston.

"After mailing their vouchers and not receiving their pay they made an investigation and found that they had worked 10 days which the State could not pay for and the young voters were not legally registered.

"We would like to have your opinion as to whether or not the Commissioners Court could pay the Registrars, at least a part of the regular salary as compensation for their services for the 10 day meeting in April out of the General funds of the County. Or would that be in violation of the law?"

In reply, I beg to advise that I know of no authority of law authorizing Commissioners Court to pay Registrars for services rendered under mistake

of law. In my opinion, the fact that your Board of Registrars met and worked ten days in April, 1936, under the mistaken idea that they were complying with the requirements of the law, cannot authorize the Commissioners Court to pay the Registrars any part of the regular salary as compensation for their services.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 27, 1937

Hon. J. E. Reid,
Clerk Circuit Court,
Scottsboro, Alabama.

1. General Acts of Alabama for 1935, page 239, creating "Scottsboro Act" does not carry an appropriation to pay the Sheriff of Morgan County for medical expenses incurred by Deputy who was wounded with a knife by one of the defendants.

2. Act Number 190, General Acts 1935, page 239, known as the "Scottsboro Act", does not carry an appropriation to pay the Clerk of the Circuit Court of Jackson County, Alabama, for expenses while in other counties assisting in the preparation of claims against the fund.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 15, 1936 in which you write as follows:

"(One)

"The Sheriff of Morgan County, Decatur, Ala. has filed with me a bill in the Scottsboro case, for first aid, hospital and medical treatment for the deputy sheriff who was wounded with a knife by Ozie Powell one of the defendants in the case.

"Would this be a legal charge to be paid out of the money appropriated to pay the expense of this case?

"(Two)

"In preparing the claims and to be able to make payment of same has made it necessary for me as Clerk in Jackson County to be in Decatur on different occasions, and spend several days there. This I have had to do at my own expense. The former Clerk in Jackson County and the Clerk in Morgan County receiving all the Clerk's fees in the courts.

"Would my time and expenses be a legal charge against the funds in this case, since it is the only fees that I would receive for service rendered in this case?"

Questions One and Two of your letter should both be answered in the negative. Section One of said Act provides "That there is hereby appropriated for the payment to persons to whom originally due, and heirs, executors, and administrators, of unpaid costs and fees of jurors, officers, and witnesses which are legal charges against any county fund now accrued or which may hereafter accrue in the prosecution of criminal charges now pending against— in the sum of $35,000 or so much thereof as may be necessary, to be disbursed

out of monies hereinafter provided." The items mentioned in your letter are not authorized to be paid from this fund, because they are not a legal charge against any county fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 27, 1937

Hon. L. C. Garrison,
Judge of Probate,
Walker County
Jasper, Alabama.

Filing tax—

Instrument in question is an option and no tax required thereon for recording.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 18, 1936, in which you request my opinion as to whether or not filing tax is due upon instrument executed by the Jasper Land Company and the Ulysses Company on the 20th day of September, 1934, a copy of which you enclosed.

I am of the opinion that the inquiry should be answered in the negative. The instrument in question, in my judgment, is an option and hence carries no filing tax.

The pertinent part of the instrument in question is as follows:

"KNOW ALL MEN BY THESE PRESENTS, That the undersigned, Jasper Land Company, for and in consideration of One Dollar and other valuable consideration by it received, does grant, as to the following described lands in Walker County, Alabama:

(Description of land)

unto the Ulysses Company, its successors and assigns, the right to use the surface over minerals underlying such lands if and when such surface is needed or required in the conduct of mining operations by the method as stripping or incidentally to the mining operation so conducted wherever such surface is owned by the Jasper Land Company. At the option of said The Ulysses Company, its successors and assigns, the Jasper Land Company will convey its title to such surface if and when such surface is needed for such stripping. The rights herein given are subject to the express reservation unto the Jasper Land Company of all timber on such lands and to the further reservation of rents or income accruing therefrom until such lands are required under the terms hereof in connection with the mining of mineral."

Construing the instrument as a whole it is my judgment that same is merely an option to be exercised by The Ulysses Company. In other words, The Ulysses Company has no right of entry or use of the land unless it exercises the option to so use same. Since the instrument in question is purely

an option, no filing tax is required thereon.—Opinion of the Attorney General to Judge of Probate, Houston County, July 5, 1935; Opinion of the Attorney General to Judge of Probate, Walker County, February 12, 1930.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1937

Hon. O. L. Andrews,
Clerk, Circuit Court,
Jefferson County,
Court House,
Birmingham, Alabama.

Court Cost—Cost taxed against State in tax appeals must be paid by the State and various taxing subdivisions thereof in proportion to the amount of taxes levied by each.

1. Cost bills should be apportioned according to the tax division of each political subdivision of the State.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 29, 1936, in which you request my opinion as follows:

"I understand that all of our cost bills against the State in the Tax Appeals from the Board of Review are being held up in your office, under Section 382 of the Revenue Code of 1935. Please advise what steps we might take to secure payment of these bills, and if we will have to render separate bills to the State, County and City of Birmingham in order to get them paid, and if these bills will have to be apportioned according to the tax divisions of each.

"I would appreciate any suggestion you might make as to the procedure for getting these bills paid."

In reply, I wish to advise you that Section 382 of the Revenue Code of 1935 provides as follows:

"Section 382. Any court costs taxed against the State, shall be paid by the State, and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. The sworn certificate of the Clerk or Register approved by the State Comptroller shall be authority for the issuance of any payment of warrants therefor by the proper officers of each taxing authority, and shall be treated as a preferred claim.

You will note particularly the first sentence of this section, which, in my opinion, commands that court costs which are taxed against the State shall be paid by the State and the various taxing subdivisions thereof in proportion to the amount of taxes levied by each. In my judgment this is applicable to tax appeal cases, and, therefore, necessitates the rendition of separate bills by the Clerk or Register to the State, County and City of Bir-

mingham for the proportionate amounts due by each as calculated in accordance with the terms of the first sentence of Section 382 of the Revenue Code of 1935 quoted above. It is further my opinion that these bills should be apportioned according to the tax divisions of each, and remittance on each bill rendered should be made to the Clerk or Register, by the said subdivision affected.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1937

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Seale, Alabama.

Taxation—Purchaser at tax sale, after expiration of period of redemption, entitled to deed from Judge of Probate upon presentation of certificate of purchase and payment of proper fee, regardless of tax payments subsequent to date of sale.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 6, 1937, which is as follows:

"At the 1932 tax sale held Nov. 27, 1933, the lands assessed to A were sold for 1932 taxes and at said sale B became purchaser of the lands for taxes and costs.

"A paid taxes on said lands for tax years 1933, 1934 and 1935, but A did not redeem from the 1932 tax sale. The time for redemption has not expired.

"B has surrendered his certificate of sale showing that he purchased the lands at the said tax sale, and asks that Tax Deed be issued to him.

"Under these circumstances am I permitted to issue Tax Deed to B. If not, how can B be reimbursed?"

I am of the opinion that your inquiry should be answered in the affirmative.

Section 241 of the Revenue Act of 1935, (General Acts 1935, p. 360) provides as follows:

"Section 241. After the expiration of three years from the date of the sale of any real estate for taxes, the Judge of Probate then in office must execute and deliver to the purchaser, other than the State, or person to whom the certificate of purchase has been assigned, upon the return of the certificate and payment of a fee of one dollar to the Judge of Probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such

deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the State and County thereto, but it shall not convey the right, title or interest of any reversioner or remainderman therein."

Said section in my judgment, is applicable regardless of the payment of taxes subsequent to the tax sale. The collection of said taxes is a matter for the tax collector. Your duties as Judge of Probate under said section are merely ministerial. Moreover, after the tax sale assessment should be made in the name of the purchaser.—**Quarterly Report of Attorney General, Vol. II, p. 241.**

The matter of A's rights under the above circumstances is one of a personal nature between A and B.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1937

Hon. Henry S. Long,
Chairman, State Tax Commission,
Capitol.

Attention: Mr. Mark L. Tucker.

Probate Judge not entitled to deduct 2½ per cent commission for citation fees and penalities in making monthly settlement with license inspectors.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 29, 1936, in which you request my opinion as follows:

"One of our license inspectors advises us that Probate Judge——— ..... in making monthly settlements with him for citation fees and penalties deducts two and one half per cent commission.

"Please let us have your opinion as to whether or not said Probate Judge has legal authority for withholding said two and one half per cent when making settlement with the license inspector."

In my opinion, the probate judge is without authority to withhold 2½ per cent of the said citation fees and penalties collected by him when making settlement with the license inspector. Section 365 of the Revenue Law of 1935 states that the probate judge "shall be entitled to receive 2½ per cent of the **amount of money collected for licenses** due the State; which he may deduct from his remittance to the State Treasury * * *." I do not find any provisions authorizing fees to be deducted or retained from citation and penalties.

The law of fees and costs must be held to be penal, and the law specifically provides that no fee must be demanded or received except in

cases expressly authorized by law. **Code of Alabama, 1923, Section 7255.** Accordingly it is my opinion, that the law in this regard cannot be extended beyond its letter and the probate judge may not lawfully withhold for himself the fees mentioned in your inquiry.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1937.

Hon. Geo. E. Stone,
County Treasurer,
Mobile County,
Mobile, Alabama

County Board of Revenue not authorized under the general laws of Alabama to pay mileage to an Assistant State Veterinarian.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 4, 1936, in which you submit the following inquiry:

"We have in our possession a warrant made out by the County Board in favor of Dr. J. M. Jowers for mileage in the use of his personally owned car in the work of T. B. Eradication in connection with cattle of Mobile County. The bill is all properly itemized, and I understand that similar claims have been paid in other Counties. Dr. Jowers is connected with the State Veterinary Department, and was making this inspection officially. Is the County liable for mileage under this condition?

It is my opinion that your question should be answered in the negative. Section 565 of the Agriculture Code of Alabama, as compiled in 1927, makes provisions for a State Veterinarian and also authorizes the State Board of Agriculture to pay him compensation and expenses.

Section 566, Agricultural Code, supra, authorizes the State Veterinarian, with the consent of the State Board of Agriculture, to appoint Assistant State Veterinarians.

Section 572 of the Agricultural Code, supra, authorizes the County Boards to make an appropriation for aiding in the suppression or eradication of infectious, contagious, or communicable diseases of livestock.

Section 587 of Agricultural Code, supra, makes it compulsory for the County Board of Revenue to provide a fund for tick eradication in the County.

Section 589, Agricultural Code, provides that the State Board of Agriculture may aid in the County defraying the County expenses of tick eradication, but not to exceed the sum of $20,000 to any County during the fiscal year.

Section 579 of the Agriclutural Code, supra, authorizes the County Board of Revenue to pay a salary to such inspectors as shall be required in the County. These inspectors are appointed and commissioned by the State Veterinarian, with the approval of the State Board of Agriculture, and are required to work under the supervision and direction of the State Veterinarian.

I am assuming from the facts stated in your inquiry that Dr. Jowers in an Assistant State Veterinarian, and that being true, he is an employee of the State of Alabama and not of the County. The State Veterinarian probably sends him into the various counties needing medical assistance in eradication work. Sections 565 and 566 of the Agricultural Code, supra, authorize the State Board of Agriculture to pay the State Veterinarian and his Assistants. It is not contemplated by the Legislature in the enactment of the several laws to which I have referred that the County should take care of any expenses of the State Veterinarian or his Assistants in the control and eradication of infectious or communicable diseases of livestock.

I do not think that Section 572, supra, which authorizes the County Board to make appropriations to aid in the work to suppress diseases of livestock clothes the Board with any authority to pay mileage of the State Veterinarian or his Assistants. I think the aid there referred to is not the aid which is rendered by the State Veterinarian, but is confined to work authorized by other provisions of the Code to be done.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 30, 1937

Dr. Richard C. Foster, President,
University of Alabama,
University, Alabama.

Board of Trustees of the University of Alabama may legally delegate to the President of the University the authority to pre-qualify contractors under the provisions of Act No. 540, approved September 14, 1935.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of January 29, 1937, which is as follows:

"The University of Alabama requests your opinion as to whether (assuming, without conceding, that the University of Alabama is one of the state agencies, as set forth in Section 14, covered by Act No. 540, 'relating to regulation and requiring a pre-qualification and classification of bidders on public improvements,' Acts 1935, page 1146, approved September 14, 1935), the Board of Trustees of the University of Alabama may delegate to the President of the University or other executive officer of the University the power to pre-qualify and classify the bidders as required by said act.

"In addition to the provisions in the Constitution, you may find Section 549 of the Alabama School Code of 1927, page, 194, to have bearing on the question."

Act No. 540, approved September 14, 1935, (General Acts 1935, p. 1146) relates to the pre-qualification and classification of persons bidding on public improvements. It provides that any person desiring to bid on public improvements must file with the "awarding authority" statements under oath containing such information as will enable the awarding authority to determine whether the applicant is competent, responsible and possesses certain financial resources.

Section 14 of said Act designates the agencies which come under the provisions of said Act. We are assuming for the purpose of answering your inquiry that the University of Alabama is subject to the provisions of the Act although there is some doubt.

At a meeting of the Board of Trustees of the University of Alabama on October 10, 1936, the following resolution was adopted:

RESOLUTION NO. 6

A RESOLUTION AUTHORIZING THE PRESIDENT OF THE UNIVERSITY TO PRE-QUALIFY CONTRACTORS AND SUBCONTRACTORS.

BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA that:

Dr. George H. Denny as President of the University of Alabama, or whoever may be acting as President of the University of Alabama, is hereby authorized and empowered to pre-qualify contractors to bid on the Stadium Addition, on the West Annex to Tutwiler Hall, and on the construction of any other building or structure or on the repair and alteration of any building or structure for the University of Alabama in accord with Act No. 540, General Laws of Alabama, approved September 14, 1935.

BE IT FURTHER RESOLVED that:

All resolutions, motions and parts thereof in conflict herewith are hereby repealed.

The above resolution was seconded by Trustee **J. A. Keller** and was adopted with the following voting Yea:

Gov. Bibb Graves,
Superintendent J. A. Keller,
Gessner T. McCorvey,
Robert E. Steiner, Jr.,
Charles S. McDowell, Jr.,
J. Kelly Dixon,
Daniel Pratt,
Henry B. Foster,
Louis L. Herzberg,
Archibald H. Carmichael
Hill Ferguson

And the following voting Nay: None.

The President thereupon declared said resolution carried and adopted unanimously.

The sole question to be determined in this opinion is whether or not the Board of Trustees of the University of Alabama can legally delegate to you,

as President of the University, the authority to pre-qualify contractors as provided by Act No. 540, supra.

Section 264 of the Constitution of Alabama provides for the management and control of the University of Alabama by a Board of Trustees. Said section is as follows:

> "Section 264. The state university **shall be under the management and control of a board of trustees,** which shall consist of two members from the congressional district in which the university is located one from each of the other congressional districts in the state, the superintendent of education, and the governor, who shall be ex officio president of the board. The members of the board of trustees as now constituted shall hold office until their respective terms expire under existing law, and until their successors shall be elected and confirmed as hereinafter required. Successors to those trustees whose terms expire in nineteen hundred and two shall hold office until nineteen hundred and seven, successors to those trustees whose terms expire in nineteen hundred and four shall hold office until nineteen hundred and eleven; "successors to those trustees whose terms expire in nineteen hundred and six shall hold office until nineteen hundred and fifteen; and thereafter their successors shall hold office for a term of twelve years. When the term of any member of such board shall expire, the remaining members of the board shall, by secret ballot, elect his successor; provided, that any trustee so elected shall hold office from the date of his election until his confirmation or rejection by the senate, and, if confirmed, until the expiration of the term for which he was elected, and until his successor is elected. At every meeting of the legislature the superintendent of education shall certify to the senate the names of all who have been so elected since the last session of the legislature, and the senate shall confirm or reject them, as it shall determine is for the best interest of the university. If it reject the names of any members, it shall there-upon elect trustees in the stead of those rejected. In cases of a vacancy on said board by death or resignation of a member, or from any cause other than the expiration of his term of office, the board shall elect his successor, who shall hold office until the next session of the legislature. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such."

There is no statutory enactment clearly defining the exact duties and authority of the President of the University of Alabama.

Section 549 of the Alabama School Code of 1927, effective as of October 1, 1927, is in words and figures as follows:

> "Section 549. APPOINTMENT OF FACULTY. —The Board of Trustees have the power to organize the University by appointing a corps of instructors, who shall be styled the faculty of the University, and such other officers as the interest of the University may require; to remove such instructors or officers, and to fix their salaries or compensation, and increase "or reduce the same at their discretion; to institute. regulate, alter or modify the government of the University, as they may deem advisable; to prescribe courses of instruction, rates of tuition, price of board, and regulate the necessary expenses of students; and

to confer such degrees as are usually conferred by similar institutions. **They may delegate to the Faculty of the University or other officers, such powers and functions in the government of the students, and in the administration of the affairs of the University, as they may deem proper;** but in no case shall any person be authorized to receive, hold or disburse any funds of the University without having first given bond, conditioned for the faithful discharge of his duties; and no person shall be excluded from the full benefit of the University Fund, or placed at any disadvantage in the pursuit of his studies, who possesses the requisite literary or other qualifications, and is willing to submit to the discipline prescribed for the students." (Italics supplied)

The part of the above section which is underscored has not been changed by the Legislature of this State since it was originally enacted into law by Act No. 153, approved March 1, 1876, (Acts of Alabama, 1876-1876, p. 268). In fact it has been readopted by various Legislatures since the time of its original adoption.

The Board of Trustees of the University of Alabama is required by law to meet only once each year although there is a provision made for calling special meetings. It is a matter of record, however, that the Board of Trustees of the University of Alabama never meets more than twice in any one year. This is due partially to the fact that the Board is composed of members who are necessarily selected from the several Congressional Districts of the State, and therefore, their respective homes are many miles distant from the places where meetings of the Board of Trustees may be held.

As the said Board meets only occasionally, and special meetings are extremely difficult to arrange, it has been the continuous practice over a long period of years, in fact ever since the passage of the 1876 Act, supra, for the Board of Trustees to delegate to the President of the University authority and powers practically unlimited in their scope. This practice has gone on continuously, and many Legislatures have assembled, charged with the knowledge of this practice, but have never adopted any legislation which would prevent the Board of Trustees of the University of Alabama from delegating such authority, but to the contrary by reenacting into law the provisions of the 1876 Act, supra, have placed their stamp of approval upon such practice.

Even if it could be admitted that the part of Section 549, supra, dealing with the delegation of powers and functions to the faculty and officers of the University, is ambiguous, that it does not clearly enumerate the powers and functions to be delegated, I am constrained to the conclusion that the Legislature, **by its acquiesence in and readoption of the aforementioned provision**, knowing full well that it was construed by the Board of Trustees to give them authority to delegate to the President of the University such authority as they deemed advisable, is tantamount to an express legislative authority for such delegation.

The rule is stated in 59 Corpus Juris, p. 1025, as follows:

"The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the gov-

ernment, or has been observed and acted upon for a long period of time, and while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons, and unless clearly erroneous, * * * In some cases the court has treated contemporaneous and long-followed construction of an ambiguous statute by executive officers or departments as controlling, or as having the effect of postitive law, especially where vested rights are involved, or where the statute itself directs the executive department to make necessary regulations to carry out its "purposes. * * * Executive construction is entitled to additional weight where it has been impliedly endorsed by the legislature, as by the reenactment of the statute, or the passage of a similar one, in the same or substantially the same terms, or by failure of the legislature, with knowledge of such construction, to change the law or adopt amendments urged."

The following Alabama cases enunciate the same principle of law: State v. H. M. Hobbie Grocery Company, 142 So. 46, 225 Ala. 151; Shepherd v. Sartain, 64 So. 57, 64, 185 Ala. 439.

The same rule is laid down in the following cases: Simmons Company v. Commissioner of Internal Revenue, 33 Fed. 2nd 75, cert. den. 280 U. S. 588: National Lead Company v. United States, 252 U. S. 140.

In my opinion, the language of Section 549, supra, expressly authorizes the Trustees of the University of Alabama to delegate to the President of the University, both ministerial and judicial powers and functions. It is to be noted that provision is made for the Board of Trustees to delegate: "Such powers and functions in the government of the students * * * as they may deem proper." This authority, in my judgment, would enable the Board of Trustees to delegate to the President of the University of Alabama all ministerial duties connected with the University of Alabama. The Legislature did not stop, however, with the above authority to delegate, but went further and said, "They may delegate * * * such powers and functions **in the administration of the affairs of the University** as they may deem proper." The use of the words "the administration of the affairs of the University," to my mind clearly evidences an intention on the part of the Legislature to give to the Trustees of the University the authority to delegate any and all duties incident to the operation, maintenance and management of the University of Alabama in addition to those duties of a scholastic nature.

The President of the University of Alabama in order to effectively "administer the affairs" of the University, must perform duties both of a **judicial** and **administrative nature.** The very Act here under consideration requires the performance of duties by some part of the University of Alabama within the time limits which absolutely destroy the possibility of their performance by a Board which meets only once a year. The Legislature realizing that from time to time duties would be enacted of the Board of Trustees that would be impossible of performance unless the said Board delegated authority to the President to act in matters of a judicial as well as ministerial nature. The duties required by Act No. 540, supra, are a striking example.

I am of the opinion that the Board of Trustees of the University of Alabama may delegate to the President of the University or other ex-

ecutive officer of the University the power to pre-qualify and classify bidders as required by Act No. 540, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 1, 1937.

Mr. B. E. Brownfield
Tax Collector, Lee County
Opelika, Alabama

Act Number 208, page 111, Local Acts of 1935 authorizes Tax Collector of Lee County to deduct for himself from taxes collected the sum of one-half of one per cent and for the Tax Assessor the City of Auburn each year as their full compensation for services performed.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of October 20, 1936, in which you want to know what you are authorized to deduct from the City of Auburn taxes as compensation for you and the Tax Assessor.

I have examined the notice, which was published in the paper, that the Local Act would be introduced, and I have also examined the original Act. I find that the notice stated that you would be entitled to one per cent and the Tax Assessor one per cent of all taxes collected as your compensation, while the Act provides that you will be entitled to one-half of one per cent and the Tax Assessor one per cent of the taxes collected for the City of Auburn each year.

It is my opinion that your compensation as well as the compensation of the Tax Assessor is controlled by Section 36 of the Act, and that you are entitled to receive as your compensation a sum equivalent to one-half of one per cent of taxes collected for the City of Auburn each year, and the Tax Assessor is entitled to receive one per cent of the taxes so collected each year and you are entitled to deduct such compensation from the taxes collected.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 2, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Tuscumbia, Alabama

TAXATION — Interest to be charged on redemption from State of individual, application of rates set forth at end of opinion.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 14, 1936 as follows:

"An application has been filed with me for redemption of a tract of land which was sold to the State in 1928, for 1927 taxes. Please advise me whether I should charge interest on the amount for which the land sold at the rate of fifteen per cent per annum from the time the property sold in 1928 until the date of redemption or whether the rate of interest has been reduced for any of the intervening years which reduced rate of interest would apply in calculating the interest on the amount for which the property sold.

"Please also advise me what interest rate would be charged on the subsequent taxes which have accrued since 1928 and whether this rate of interest on the subsequent tax is uniform for each of the years in which the tax has accumlated from 1928 to the present. I desire particularly to know whether there is a different rate of interest on taxes for any of the subsequent years. I note that the rate of interest has been changed from time to time by various acts of the legislature but I do not understand how these various changes affect the subsequent taxes to be collected in cases of property sold to the State in 1928."

I have heretofore held that on redemption from the State of Alabama of lands sold for taxes, that the statutory rate of redemption, namely, of 15% interest on the taxes due the State at the time of the sale and 8% interest on subsequent taxes after maturity when the sale for taxes took place before September 15, 1932, and on tax sales after September 15, 1932, an interest rate of 8% on the taxes due at the time of the sale and on subsequent taxes after maturity, prevailed, but on further consideration of the subject, including all the reasons for legislative enactments and the causes underlying the statutory changes made during the depression, I have reached the conclusion that the last paragraph of my opinion dated November 22, 1935, reported in Quarterly Reports of the Attorney General, beginning page 207, addressed to the Hon. Eugene Hawkins, Probate Judge, Birmingham, Alabama should be stricken and this opinion substituted therefor. I, therefore, substitute this opinion for said paragraph.

In approaching the conclusions which will appear in this opinion, I think a brief reference to or summary of each and every statute since 1907 which, in my opinion, affects, controls, or sheds any light hereafter on the subject, is advisable. When I use the words "interest on the tax sale," or "interest on tax installments," or by using words of similar import, I refer respectively to interest on the taxes for which the sales were made and interest on installment taxes after the sale and from maturity thereof.

I shall attempt to list the statutes in their chronological order as nearly as I can, with brief reference as to the amount of interest provided in each enactment.

Section 2314 of the Code of 1907, for redemption of land sold to the **State** or to an **individual,** imposed an annual interest rate of 15% on the tax sale and an annual rate of 8% on subsequent installments.

Section 3110 of the 1923 Code of Alabama fixed an annual interest rate for redemption of lands sold to the **State** at 15% on the tax sale and 8% on subsequent installments. There was no change in the law of 1907.

Section 3111 of the 1923 Code of Alabama fixed the interest rate on land sold to an **individual** and for redemption from such sale there was no change in the law of 1907. The rate remained at 15% and 8%.

Act Number 157, General Acts of Alabama for 1931. The Legislature of 1931 enacted a law giving additional time for payment of taxes and also changing the interest rate for redemption of land sold for taxes. This Act was by this office declared unconstitutional and void. (Biennial Report for 1930-32, pages 264 and 308).

Act Number 19. General Acts of Alabama, 1932, page 17, approved September 15, 1932, and effective on that date, reduced the interest rate on sales to the **State.** This Act made the rates 8% on both the tax sale and the subsequent installments, but operated in the future and had no retroactive effect. (Biennial Report for 1932-34, page 167). This Act amended Section 3110, of the 1923 Code of Alabama.

Act Number 20. General Acts of Alabama, 1932, page 18, approved September 15, 1932, and effective on that date, reduced the interest rates on tax sales made to an **individual,** fixing an annual interest charge of 8% both on the tax sale and on subsequent installments. This Act amended Section 3111 of the 1923 Code of Alabama, and operated only in the future and had no application to sales made prior to September 15, 1932.

Act Number 194, known as the Revenue Act of Alabama, page 256, General Acts of Alabama for 1935, **Section 269,** reduced the interest rate on tax sales made to the **State** and on subsequent installments to 6% and, as I shall point out later, included sales made before and after January 1, 1935.

Act Number 194, (Revenue Act of Alabama) General Acts of Alabama, 1935, Section 270, fixed an annual rate of 6% for tax sales made to **another than the State,** but operated only as to tax sales made after January 1, 1935. The rate was 6% on the tax sales and on installments.

Act Number 194, (Revenue Acts of 1935) Section 290 thereof, provided that the provisions of Sections 269 and 270 of Act Number 194 should apply to all tax sales made **subsequent to January 1, 1935.**

Section 291 of Act Number 194, (Revenue Act) provided that on all tax sales made to the State before January 1, 1935, the annual interest rate provided for sales after January 1, 1935, should apply, except certain sales made within a certain period to the State could be redeemed without interest, provided application is filed before January 1, 1937. The rate of interest fixed by this Section was 6% on the tax sales and on the subsequent installments. Note that this change is confined to sales made to the State.

Section 291 of Act Number 194, was amended by Act Number 49, page 27, General Acts of 1936. This amendment merely changed the procedure for redemption, but did not change any provision with reference to reduction of interest as the Act originally provided.

Section 269 of Act Number 194 (Revenue Act) was amended by Act Number 256, page 1113 of the General Acts of 1935. This Act Number 526

was approved and became effective on September 14, 1935. This Act contained words relating to interest as follows: "to make such redemption shall deposit with the judge of probate of the county in which the land is situated, the amount of money for which the lands were sold, **with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate prevailing from maturity of such taxes.** * * *"

Section 269 of Act Number 194, as amended by Act Number 526, was again amended by Act Number 56, Acts of 1936, page 30. The amendment was presumably made to avoid confusion as to whether or not act Number 526, above referred to, modified or affected the provisions of Section 291, Act Number 194 (Revenue Act) as to exemptions granted and also to change the procedure of redemption. No change was made in the wording (above underscored) which relates to interest.

Section 8563 of the 1923 Code of Alabama fixed the lawful rate of interest in Alabama at 8%, but this rate was changed by Act Number 37, Acts of 1935, page 69, and the change became effective on February 9, 1935.

My former opinion held that Section 269 as amended by Act Number 526, employing the words which I have underscored, referred to the Statutory rate for redemption imposed by Section 3110 of the 1923 Code of Alabama on all sales made prior to September 15, 1932, when Act Number 20 was enacted by the 1932 Legislature, and that after that date, all sales carried a lower rate as provided by said Act Number 20. It is to be noted that Act Number 157, adopted in 1931, which was declared unconstitutional did not interrupt, alter, change, or modify the interest rate provided by Section 3110.

The Legislature did not see proper to change Section 270 of the Acts of 1935, page 256, and it is now the law that the **interest** to be paid for redeeming lands sold to an **individual after January 1, 1935,** is 6% on the tax sale and the same rate on subsequent installments, while the construction that I formerly gave to the words employed in Section 269, General Acts of 1935, page 256) as subsequently amended in 1935 and in 1926, requires an annual rate of 15% on the tax sales and 8% on subsequent installments to be paid for redemptions of sales made to the State prior to September 15, 1932, and on sales after that date and until the present time, with continuous operation until changed, an annual rate of 8% on tax sales and on the subsequent installments. A difference of 2% on sales made to the State over sales made to individuals after January 1, 1935—the redemption charges to be paid to the State being higher than those to be paid an individual.

There is no statutory recorded evidence of any legislative effort from 1907 to 1931, to reduce or otherwise change the interest rate redemption of land; therefore, there must have been some economic reason for the reductions granted in the Acts set forth in this opinion. I feel justified in concluding that the severe economic depression during the last several years inspired the legislatures convening during this depression to reduce the burden of interest and penalties for redemption; also to reduce the lawful rate of interest in Alabama from 8% to 6%, effective on February 9, 1935, when Section 8563 of the 1923 Code of Alabama as amend-

ed was approved by the Governor. The reductions were reflections of efforts on the part of the United States Government to ameliorate the interest burden by the passage of laws making loans direct to farmers and to other borrowers; also reflections of a national desire to lessen all burdens so that the common masses of people could make a living. Relief agencies were established, both direct and work. Millions were loaned to cities at low interest rate in order to provide work. The Congress enacted a law for a moratorium on mortgage foreclosures. The legislatures of Alabama during the depression joined hands with this worthy movement as evidenced by several laws with reference to interest. With the exception of the Act passed in 1931, these enactments by the Legislature of Alabama were by this office sustained as constitutional and held not violative of Section 100 of our constitution. A like ruling on the constitutionality of a similar statute in Louisana, involving a constitutional provision similar to ours, was made by the Court of Appeals of Louisiana in the case of State ex rel. Huggett, etc. vs. Montgomery, 167 So., page 147. These extrinsic facts are strongly persuasive that the different legislatures of Alabama since 1930 have manifested a very pronounced determination to lessen the burden of interest on redemptions of land and on contracts.

Should I adhere to my former ruling that the legislature of 1935, after having passed a law exempting redemptions on sales within a certain period from all interest, after enactment of Section 269 and Section 270 reducing the interest to be paid, intended by Section 269 as amended in 1935 and in 1936 to revert to interest rate of 15% as provided by Section 3110 of the 1923 Code of Alabama for sales made prior to September 15, 1932, the date Section 3110 was amended, and 8% on sales made after that date, I would be ignoring, in my interpretation of the intent of the Legislature, the several inducements leading to the enactment of Section 269. In determining the intent of the Legislature, I must take into consideration the fact that the Legislature in amending Section 269 could have left out all reference to interest and by so doing, the interest provided by Section 3110 and that Section as amended in 1932 would have been the only law left govering the interest to be charged on redemptions from the State. I do not think I should interpolate words in Section 269 as amended in the following manner: "prevailing **for redemption.**" Such interpolation contravenes the evident spirit and desire of the Legislature to help the masses of people. Also I find that my former opinion requires a higher rate of interest, namely 8%, to be paid on redemption of tax sales to the State since January 1, 1935, than is required in the same period, namely 6%, on redemptions from an individual. It was certainly not the intent of the Legislature to seek that advantage for the State. The author of the amended Section 269 might have intended the statutory rate for redemptions should prevail, but I don't believe that members of the Legislature in the amendment of Section 269 ever intended the statutory rate for redemptions should prevail, because a logical and reasonable construction of the wording does not so indicate their employment in that capacity.

I therefore, render an opinion as follows on the interest rates to be charged:

(1) When the State was the purchaser at tax sales made before February 9, 1935, the date lawful interest rates in Alabama were changed, interest at an annual rate of 8% should be charged on the amount of taxes for which the sale was made.

(2) When the State was the purchaser at tax sales made after February 9, 1935, interest at an annual rate of 6% should be charged on the amount of taxes for which the sale was made.

(3) When the State was the purchaser at tax sales before February 9, 1935, interest at an annual rate of 8% should be charged on subsequent tax installments which mature before February 9, 1935, and on those maturing after February 9, 1935, an annual rate of 6% should be charged. The interest, varying according to maturity, is to be charged from maturity.

(4) When the State was the purchaser at tax sales after February 9, 1935, interest at an annual rate of 6% on the amount for which the land was sold and at 6% on subsequent installments from maturity should be charged. The rate on the original taxes and on the installments is the same.

(5) When another than the State was the purchaser at sales made before September 15, 1932, the date Section 3111 was effectively amended, an annual rate of 15% on the amount of taxes for which the land was sold and an annual rate of 8% on the amount and from the maturity of subsequent installments should be charged.

(6) When another than the State was the purchaser at sales made after September 15, 1932, the date Section 3110 as amended became operative, an annual rate of 8% on the amount of taxes for which the land was sold and on the amount (from maturity) of subsequent installments should be charged.

(7) When another than the State was the purchaser at sales made after January 1, 1935, the date Section 270 of the Revenue Code became effective, an annual rate of 6% interest on the amount of taxes for which the land was sold and on the amount (from the maturity) of subsequent installments should be charged.

It is again to be noted that Act Number 157, General Acts of 1931, attempting to reduce interest rates on redemption was declared unconstitutional. Therefore, the interest rates set forth in that statute have no bearing on the subject. Also at this time all exemptions from interest provided by Section 291 of the Revenue Act have expired.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Geo. Lewis Bailes,
Solicitor, 10th Judicial Circuit,
Birmingham, Alabama.

Witnesses - Entitled to only one witness certificate for each day in attendance before the Grand Jury although summoned in two or more cases, regardless of whether defendants are connected in same crime or not.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 22, 1936, in which you request my opinion as follows:

"On October 29, 1936 you rendered an opinion to the Hon. Charles W. Lee, State Comptroller, on the following proposition:

Where witness summoned to appear in more than one criminal case in one day, he is entitled to claim and receive his fee where payment is available in every case where he proves attendance.

"This opinion was written by Assistant Attorney General Loeb.

"I would like for you to give me your opinion as to the application of this opinion to witnesses who appear before the Grand Jury of this county. The witnesses who appear before the Grand Jury frequently have more than one subpoena. However, the witness only appears once. In the event he has two or more subpoenas in seperate cases his testimony is taken in all of these cases at the same appearance before the Grand Jury. I would like for you to give me your opinion on the following questions:

"1. A witness appears before the Grand Jury in answer to two or more subpoenas in which all of "the defendants are companions in one crime. This witness will only testify once before the Grand Jury and his testimony is cross-referenced to each of the cases he is summoned in. He will usually be in the Grand Jury room only a few minutes. Would he be entitled to a witness certificate in each of these cases, or in only one?

"11. Witness appears before the Grand Jury summoned in two or more cases wherein the defendants are not connected in the same crime. He only appears once in the Grand Jury room and his testimony in all of these cases is taken at one appearance. Would he be entitled to a witness certificate in each of these cases, or in only one?

"I realize that any witness summoned before the Grand Jury is supposed to divulge any information he has regarding any criminal case, but it is the practice here to issue a summons in each case for the witness. Each of these subpoenas are numbered seperately with corresponding number on the Grand Jury docket."

I am of the opinion that a witness appearing before the Grand Jury, whether in answer to two or more subpoenas in which all of the defendants are companions in one crime or wherein the defendants are not connected in the same crime, where such witness appears only once in the Grand Jury room and his testimony in all of such cases is taken at one such appearance, is entitled to only one witness certificate for his appearance.

At common law witnesses were compelled to attend court without pay and the fees given them by statute are not intended as compensation for testifying, but simply to pay their expenses while away from home. A witness who is subpoenaed or summoned to appear before the Grand Jury must appear before that body and submit to an examination in respect to any matters within his knowledge. (Code of Alabama, 1923, Sec-

tion 8679. This examination may be completed at once and it may continue from day to day, to suit the convenience of the Grand Jury, and the witness must remain in attendance until it is completed. The fees of witnesses in criminal cases are fixed by Section 3762 of the Code of Alabama of 1923 as amended by General Acts of 1932, extra session, page 102. This Section provides:

> "Witnesses in criminal cases are entitled to 75c per day and 5c for each mile to and from their residence by the route usually travelled and all necessary ferriages and tolls."

This section makes the witness' fees dependent neither on the number of times he has been summoned nor the number of subpoenas served on him nor on the number of indictments found on his evidence, but on his travel and attendance. The reason for this is plain: Interest in the outcome of the action always tends to discredit the witness, and the Legislature would never intentionally discredit all witnesses who come before the Grand Jury, by making their fees contingent on the number of indictments found on their testimony. Cf. Healey v. Hillsboro County, 49 Atl. 89.

Thus it may be seen that the fees of witnesses before a Grand Jury are based entirely on the attendance of the witness and not the number of cases in which he is called to testify. Accordingly, as hereinabove said, I am of the opinion that the witnesses appearing in the cases mentioned in your inquiry are entitled to only one witness certificate for each day in attendance.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Deed given for purpose of perfecting title, without consideration, not subject to deed tax.

Opinion under date of October 23, 1936, is hereby overruled.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

Opon further consideration of your request of August 28, I withdraw the opinion rendered to you under date of October 23, 1936, and substitute the following:

The deed which you enclose is not subject to deed tax. It shows on its face that the property was owned by the W. S. Dickey Clay Manufacturing Company prior to proceedings under Section 77 (b) of the U. S. Bankruptcy Act. During these proceedings, title to the property was vested in the trustees, but the composition offered by the debtor having now been confirmed by the Court as shown by the deed), title to the

property revested in the company by operation of law (Section 70 (f) U. S. Bankruptcy Act).

No consideration was paid to the trustees for the execution of the deed, and in my opinion, it was executed only for the purpose of perfecting title already vested in grantee. It is therefore exempt from the deed tax under that part of Schedule 46 of the 1935 Revenue Act which exempts "deeds or instruments executed for a nominal consideration for the purpose of perfecting the title of real estate * * *" (See Long v. Jasper Land Co., 217 Ala. 593; 117 So. 210). (Contrast Hawkins v. Pure Oil Co., 169 So. 307 (1936).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Margaret Hornsby,
Custodian of School Funds,
Elmore County,
Wetumpka, Alabama

Schools — County Boards of Education may employ attorney to prepare necessary papers etc. in order to secure loan.

Opinion by Assistant Attorney General Screws.

Dear Madam:

I have your letter of December 28, 1936, which is as follows:

"On two different occasions this year, it became necessary for the County Board of Education of Elmore County, upon recommendation of the county superintendent, to borrow money to pay the salaries of teachers and meet current expenses, the funds on hand at such times being insufficient for such purposes. In each case, while the lender would agree to make the loan, it would not do so unless a competent attorney would supervise each step of the proceedings, the passing of the proper resolutions, the form of the minutes, the preparation of the written evidence of the debt with proper execution thereof pledging the school revenues for repayment of the loan and would make investigation of the amount of security pledged and recommend the sufficiency of such security. The lender also attached as a condition that the board would pay the attorney for such services. The board agreed to the terms and the loans were negotiated in pursuance of the agreement. The attorneys in due course presented their bill for such services, which fee the board considered reasonable and ordered paid.

"I understand that it has been suggested that the board is without power to pay a fee to an attorney merely for preparing minutes; but where, as here, the services of an attorney are necessary to effect the procurement of a valid loan I would like to know whether the claim for such fee is a legal one. Can the board pay such fee and contract to pay it under its general powers to sue and be sued and to

contract, and can the custodian of school funds "properly pay the same on order of the board?"

I am of the opinion that your inquiry should be answered in the affirmative.

The rule relative to the employment of attorneys by County Boards of Education is set out in opinion of the Attorney General found in Biennial Report, 1930-32, page 763. The pertinent part of said opinion is as follows:

> Section 132 of the School Code, 1927 provides that the County Board of Education may sue and contract, which provision, of necessity, involves the liability of being sued. The authority to sue and to be sued, of necessity, carries with it the authority to employ and compensate counsel, when such Board is acting within the scope of its authority, and when counsel for such purposes has not been provided by law.—**Jack vs. Moore,** 66 Ala. 188; Biennial Report Attorney General, 1926-28, page 418.
>
> "However, such agents as boards of education are without authority to employ counsel in cases where counsel may by law be provided, whether by special provision by statute or by implication. The law provides instances where the Board of Education is to be advised by the Attorney General or, by possible implication, by the County Solicitor; also, where the State is a party in interest directly or indirectly the law provides that the Solicitor and Attorney General shall prosecute or defend its interest. In such instances the Board of Education would not be authorized to employ counsel but must avail itself of the counsel provided by law. - **Biennial Report Attorney General.** 1926-28, page 418, supra."

Applying the above rule in the instant case it is my opinion that the duties for which the attorneys were employed are not such as should be performed by the Attorney General or County Solicitor. Therefore, if the employment of an attorney for the purposes stated in your inquiry was necessary, same could be paid for by the County Board of Education. The question then presents itself as to whether or not the County Board of Education had authority to employ an attorney for the purposes as set out in your inquiry. In my judgment it has.

The services rendered by the attorneys, as outlined in your request, go far beyond the mere ministerial act of simply preparing the minutes of the Board. The demand of the lender of the money to the Board, under the facts outlined, is a reasonable and prudent one. The exercise by the Board of this power to borrow money to carry on its corporate functions is frequently and necessarily used. The exercise of this power and the necessity therefor was anticipated by the Legislature in the Acts of 1935 page 728, Sec. 9, and in a number of Acts of similar nature preceding it. There can be no question of the Board's power to employ an attorney to represent it in litigation, whether it plays the role of plaintiff or defendant. This would naturally flow from the power to sue and be sued. I can see no real distinction between those cases where the Board employs an attorney in actual litigation and a case where it becomes necessary in the exercise of its functions to secure the services of an attorney to effect a legitimate objective. To deny the Board the power to contract, as out-

lined in your inquiry, would seriously hamper it, and in my opinion the Legislature never intended to impose such a restriction, but that on the contrary such a right is clearly implied.

The premises considered, it is my opinion that the County Board of Education had authority to employ an attorney for the purposes set out in your inquiry and payment for said services may be made from school funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Walter K. McAdory,
Chief, Alabama Highway Patrol,
Montgomery, Alabama.

Court Reporter - Court Reporter not required to furnish State Solicitor with transcription of testimony taken at trial of criminal offense, unless he be paid lawful charges therefor.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your request of November 30, 1936, from which I quote as follows:

"I would thank you for an opinion involving the following matter:

"In Geneva County, one Alfred was tried for murder, which resulted in a mistrial. The Solicitor desires a transcript of the evidence in the first trial. Again in the case of State v. Florence Carr, in Barbour County, trial for murder in which Carr was convicted for manslaughter in the first degree. He has appealed his case. Three other defendants are to be tried in the same case.

"What I want to know is, is the Court Reporter required to furnish the State with a transcript of the testimony in these two cases without charge."

The office of Court Reporter is created by statute; he is appointed by the Circuit Judge, and he is entitled to fees for services rendered in transcribing testimony taken at the trial of a criminal offense. I quote Section 6735 of the 1923 Code of Alabama as follows:

"The Court reporter shall furnish, within thirty days, or such other time as the judge may prescribe, to any party to a "cause reported by him, upon, demand being made for the same, or upon order of the presiding judge, a typewritten transcript of his stenographic notes or any part thereof, except proceedings before the grand jury, upon payment of a transcript fee of ten cents for each one hundred words thereof, and for each carbon copy made at the same writing, five cents for each one hundred words thereof; but such court

reporter shall not be required to perform any part of such service until the payment or security thereof is assured."

I can find no provision in the laws of Alabama requiring the Court Reporter to transcribe his notes of evidence taken at a criminal trial upon order of the Solicitor, or any other State Official, unless be be paid therefor.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Mr. Gaston Scott, President,
State Highway Commission,
Capitol.

State Highway Department may pay final estimate on contract without prejudice to pending claim of contractor for extra work not included in original contract.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of November 30, 1936, in which you submitted an inquiry as follows:

"This Department requests an opinion as to whether or not the Commission has the authority to pay the final estimate to a contractor on a highway contract when said contractor submits a claim against the Commission for additional work, or materials and requests that final settlement be made, and that such settlement, however, be paid without prejudice to the claim pending action by the Commission or; is it the duty of the Commission to hear and decide the settlements of the claim before the final estimate is paid.

"Page 43, last paragraph, of the Standard Specifications of the Highway Department provides final payment operates as a release to the Highway Department of claims. There is a copy of the Standard Specifications in the office of Mr. Walter Knabe, Assistant Attorney General."

It is my opinion that you are authorized to pay a contractor his final estimate, and that such payment does not prejudice the right of the contractor to payment of his pending claim for work done which was not a part of the original contract.

Such final estimate may be paid provided there are no obstacles as set forth in Sub-section 9, Point 0-9 of Sec. 9, of the Standard Specifications. The last paragraph of said subsection has no application unless the liability therein referred to relates to, or was to be done under the contract. I assume from your letter that the extra work formed no part of the contract, and that being so, payment of the final estimate would not relieve or release the State of Alabama from its obligation to pay the contractor for extra work done on the project. I quote the last paragraph of said subsection as follows:

"The acceptance of the final payment as aforesaid shall operate as and shall be a release to the State, the Director, and the Engineer from all claims of liability under this contract for anything done or furnished or relating to the work under this contract or for any act or neglect of said State, said Director or said Engineer."

I think the release is pertinent only to work done under the Contract and not to extra work done.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. J. L. Kaufman, Chairman,
Unemployment Compensation Commission,
Capitol.

Act No. 447, General Acts of Alabama for 1935, page 950—Employer doing work on Warrior River under contract with Federal Government liable for payment of employee—contribution, as provided by Section 4 (D) of said Act No. 447.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I quote from your communication of December 12, 1936, as follows:

"I shall appreciate a ruling on the following set of facts:

"Section 4 (d) of the Act creating the Alabama Unemployment Compensation Commission, provides as follows:

" 'Each employee shall contribute to the Fund one per centum of his wages earned after May 1, 1936, and after the date as of which the conditions determining whether or not his employer is or will be subject to the Act have been fulfilled. Each employer shall be responsible for withholding such contributions from the wages of his employees, shall show such deduction on his payroll and records, and shall transmit all such contributions to the Fund pursuant to general Commission rules.'

"An employer who is subject to the Alabama Unemployment Compensation Act performed work during the year 1936 on the Warrior River under a contract had with the Federal Government, in which contract appeared the following clause:

" 'All employees shall be paid in full not less often than once each week in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.'

"We desire your opinion as to whether such provision hereinabove set out relieves such employer from paying to this Commission employee-contribution, based on wages paid to the employees of such employer."

It is my opinion that the employer referred to in your letter is not relieved from paying to you the employee-contribution, based on wages paid the employee.

The employees, in my judgment, are not performing service in the employment of the United States Government or of an instrumentality of the United States. The contract set forth in your letter does not offer such exemption. This contract provides that "There shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process." The fact that legal process may be used to collect the debts of the employee is within itself convincing proof that the employee is not in the employ of the United States Government. If the employee was in the employ of the United States Government, such process would not be available against the Government.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. L. E. Hall,
Circuit Clerk,
Troy, Alabama.

Local Acts of 1919, page 205, authorizes County Commissioners of Pike County to pay Clerk of Circuit Court $3.00 a day from the general fund of said County for assistant during term time of Jury and Non-Jury Courts.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 16, 1936, in which you write me as follows:

"Will you kindly advise me whether or not I am entitled to an allowance of $3.00 per day from the general funds of Pike County, for the purpose of paying an assistant employed by me to assist in the performances of my duties as Circuit Clerk during the term times of said Circuit Court held in said County, under Local Acts of 1919, page 205, approved September 24th, 1919.

"If you answer that I am entitled to this allowance under said act, please advise whether the act covers jury terms only, or applies also to non-jury terms."

The Local Act which you mentioned in your letter makes no distinction between the term time of a Jury Court and the term time of a Non-Jury Court, but says you shall be allowed $3.00 a day during term time for the

purpose of paying an assistant during the term times of Circuit Courts held in Pike County.

It is my opinion that you are entitled to the pay for both Jury term and Non-Jury term.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. H. M. Brittain,
Chairman Commissioners Court,
Wedowee, Alabama.

1. County Commissioners of Randolph County not authorized to refund Circuit Clerk's commissions which he paid to County on Solicitor's fees collected, if Clerk has disposed of State bonds which the State Convict Department delivered to him.

2. County Commissioners not authorized to accept fine and forfeiture claims from Circuit Clerk in settlement of County's claim for excessive ex-officio fees paid to Circuit Clerk.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I refer to your letter of December 16, 1936 in which you write me as follows:

"In an examination recently made on the books and records in the office of the Circuit Clerk of Randolph County it was discovered that there was in the hands of the Clerk some Solicitor's fees which were due the county and had not been paid to the county until the end of the examination. The examiner charged these fees against the Clerk and upon demand made by the examiner the Clerk paid the full amount of said fees into the county treasury including his commission as allowed by law. The greater portion of these fees were contained in warrants from the State Convict Department in 1931, which said warrants were not paid to the Clerk but were taken up by the State and bonds given in their stead. These bonds were made payable July 1, 1938.

"The Clerk has filed a claim with the Commissioners Court for the collection, or refund by the County, of his commissions on the above mentioned Solicitor's Fees.

"Please advise whether or not the Commissioners Court has authority to pay this claim.

"Also please advise whether the Clerk of the Circuit Court can pay or refund an excess collection of ex-officio fees paid to him by paying into the County Treasury claims against the Fine and Forfieture Fund in the amount of the excess ex-officio fees collected by him."

You state in your letter that the Circuit Clerk received bonds from the State Convict Department in payment of warrants which he held for Solici-

tor's Fees, but you do not state whether or not these bonds are now in the custody and possession of the Circuit Clerk. If these bonds were given in payment of items due the Clerk as well as the County, the Clerk would be under no duty to deliver these bonds to the County in payment of the amount due the County, because the Clerk would be entitled to their possession and control as well as the County. If the bonds were issued solely for the payment of Solicitor's fees the Clerk would still be entitled to hold them because of his interest in the bonds. The Clerk has no right to dispose of or convert the bonds to his own use, and it is on the assumption that the Clerk has disposed of the bonds that I am holding as follows:

The County Commissioners of your County are not authorized to refund to the Circuit Clerk the commissions which he paid to the County in settlement of a debit made against him by the examiner. If the Clerk sold the bonds at a loss it was his duty to account to your County for the full amount of the Solicitor's fees without any deduction therefrom for losses incurred in the sale of the bonds. If the Clerk failed to account to the County within a reasonable time after the sale or other disposition of the bonds, he was properly charged with his commissions and he is not entitled to any refund for the payment therof.

Answering your second question as to whether or not the County Commissioners are authorized under the laws of Alabama to accept fine and forfeiture claims from the Clerk in settlement of a claim the County has against the Clerk for excessive payment of ex-officio fees, it is my opinion that the County Commissioners have no such authority. The fine and forfeiture fund is contingent and the payment of claims against said fund is likewise contingent. The Commissioners are lawfully authorized to accept only cash in payment of said obligation of the Clerk. The Clerk was paid with money and he should repay the debt with money instead of fine and forfeiture claims.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. O. C. Weaver,
County Superintendent of Education,
Escambia County,
Brewton, Alabama.

Schools—Act No. 187, H. 264, approved July 28, 1919, (General Acts 1919, p. 187) is constitutional, but is applicable only to lands donated thereunder and has no retroactive operation. Said Act is not affected by Section 387 of the School Code of 1927.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 4, 1937, in which you present the following inquiries:

"1. Is Section 1 of Act No. 187, approved July 28, 1919 and appearing in the Acts of 1919, page 187 constitutional?

"2. If this Act is constitutional in its prospective operation would it be constitutional with respect to transactions prior to its date in view of limitations contained in Section 99 of the Constitution?

"3. If constitutional as to transactions either before or after its adoption, or both, what authority, if any, other than court may ascertain the existence of conditions under which the title to land affected by the Act shall revert to the original owner?

"4. Is said Act affected in its operation by Section 387 of the Alabama School Code of 1927?

The Act in question provides as follows:

"Section 1. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA, That when any lands are donated to the State as sites for a rural public school, and deeded to the State for a nominal consideration as a donation, and the use thereof for public school purposes is thereafter permanently abandoned for such purpose, the title of the land so deeded shall revert to the original owner, provided that the buildings or other improvements may be removed from such land within a reasonable time after abandonment by the school authorities and disposed of for the benefit of the public school in such district as the trustees of such district may determine.

"Section 2. The county boards of education are authorized to accept gifts of land for such schools with the approval of the State Superintendent of education under the terms of this act and when so deeded to the State, such conveyance shall be sufficient to authorize the State department of education to extend the State aid authorized by law in the erection of public school buildings.

"Approved July 28, 1919."

In answer to your first inquiry, I am of the opinion that the Act in question is constitutional and valid. Said Act must be construed as a whole and not by sections. However, it is applicable only to lands donated to the State under the strict terms thereof. It has no retroactive operation. Therefore, said Act is not violative of Section 99 of the constitution of 1901, as a reversion thereunder would not amount to a donation of State lands to private persons by the State.

Your second inquiry is answered above. If said Act be construed as retrospective in its operation, same would be in violation of Section 99 of the Constitution of 1901, supra.

In answer to your third inquiry, it is my opinion that there is an automatic reversion when the use of the property for public school purposes is permanently abandoned. Of course, as above stated, this is applicable only to lands donated to the State under the terms of said Act.

I am of the opinion that your fourth inquiry should be answered in the negative. Section 387 of the School Code does not apply to lands donated under the Act under consideration. Both of these provisions of law relative to school lands have a separate field of operation. Neither has any relation to the other.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Judges of Probate—Fiduciary funds on hand for a period of five years and unclaimed should be paid into the County Treasury and kept in a separate account for ten more years.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 27, 1936, which is as follows:

"At the time I became Probate Judge of Madison County my predecessor turned over to me fiduciary funds consisting mainly of amounts theretofore paid into the Probate Court for account of minors and unknown or non-resident heirs and never claimed by the owners.

"It appears that some of such funds were in the hands of the Probate Judge of Madison County for a period of five years or longer and still remain unclaimed. Would it be proper for me to pay into the County Treasury all such funds which have been held by the Probate Court for a period of five years or longer and that have not been claimed? If it be that I should pay such funds into the County Treasury, into what account should the County Treasury of Board of Commissioners place such funds? Do they become general funds of the County or must they remain segregated by the County? If it be true that I should pay this money into the County Treasury, what sort of release or order should be obtained or issued to properly discharge me from future liability for any such funds so turned over?

"I refer you to Chapter 352, Article 11, Sections 10465-6 of the Code of Alabama of 1923."

The answers to your inquiries are governed by Section 10465-10466, Code of Alabama, 1923. Said sections provide as follows:

"Section 10465.—Funds to be paid into county treasury after five years.—If at any time it should appear to the court, or be made known to the court, that any balance has been in the hands of any officer for a period of five years and the same remains unclaimed, it may make an order directing the same to be paid into the treasury of said county, and a separate account shall be kept of all such payments and so designated as to identify each transaction."

"Section 10466. May be paid out on order of court to owner.—Any person entitled to any amount so paid into the treasury or any part thereof may within ten years after such payment into the treasury recover the amount to which he may be entitled, without interest, by obtaining an order from the court under whose order the same was paid into the treasury. Such order may be made by the court on summary motion against the probate judge of the county after five days' notice unless the court for sufficient reasons continues the hearing to a further time."

It will be seen from the above that any fiduciary funds in your hands for a period of five years, which remain unclaimed, must be paid into the county treasury under order of the court. The court should immediately make this order when it ascertains that the funds have been in your hands for a period of five years where the same remains unclaimed. After the transfer is effected a separate account should be kept as to all payments and so designated as to identify each transaction. I suggest that you take receipts from the county treasurer when said funds are paid over to him.

The county treasurer in turn holds said money in separate accounts for a period of ten years after he receives same in order to meet any claim against said funds which might be filed within that time under Section 10466, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937

Hon. J. R. White,
Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—Under Act No. 379, H. 191, approved September 9, 1935, (General Act 1935, p. 803) known as the "County Financial Control Act", only one county officer, which is the Judge of Probate or the Chairman of the Board of Revenue or other governing body, or such officer as may be designated by such Board, may issue warrants against the General Fund payable out of the County Treasury or Depository.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 18, 1936, which is as follows:

It is the desire of the Board of Revenue of Walker County to pass appropriate resolutions authorizing the following:

"1. The Clerk of the Circuit Court of Walker County to issue jurors' certificates and witness certificates on the County Treasury for the payment of jurors and witnesses and authorizing the County Treasurer to pay any jurors' certificates and witness certificates so issued or drawn and presented to him for payment.

"2. The Judges of the Circuit Court or either of them, to issue or draw checks or warrants on the County Treasury for the payment of the salaries of the Court Reporters and other claims legally incurred and to authorize the County Treasurer to pay any checks or warrants so issued or drawn and presented to him for payment.

"3. The Judge of the County Court of Walker County to issue or draw checks or warrants on the County Treasury for the payment of the salary of the Judge of the County Court and other claims legally

incurred and authorizing the County Treasurer to pay any checks or warrants so issued or drawn and presented to him for payment.

Section 5 of the County Financial Control Act provides that warrants or checks drawn on the county Treasury shall be issued only by the Judge of Probate or Chairman of the Board of Revenue or **'such other officer as may be designated by such Board.'**

"I would like to be advised if the Board of Revenue of Walker County would have the authority by appropriate resolutions to authorize the Clerk of the Circuit Court, the Judges of the Circuit Court, and the Judge of the County Court to issue the jurors and witness certificates and checks and warrants for the purposes hereinabove stated. The Board of Revenue would like to pass these resolutions but does not want to do so unless we would be complying with the law."

Before specifically answering your inquiry, I wish to state that this office ruled that Act No. 379, H. 191, approved September 9, 1935, (General Acts 1935, p. 803), is applicable only to the General Fund of the County.—**Opinion to Judge of Probate, Elmore County, October 7, 1936; Opinion to Judge of Probate, Colbert County, October 7, 1936.** It has been also specifically ruled that it does not apply to the Fine and Forfeiture Fund.—**Quarterly Report of Attorney General, Vol. II, p. 62.**

Therefore, your inquiry involves only an interpretation of Section 5 of the Act under consideration as regards payments from the General Fund of the County. Said Section provides as follows:

"Section 5. — WHO SHALL ISSUE WARRANTS. No warrant shall be issued or check drawn on the County Treasury or County Depository by any person except the Judge of Probate or Chairman of the Board of Revenue, or like governing body, or such other officer as may be designated by such Board; and officers who are authorized to pay claims which have not been first approved by the Board, shall issue orders for warrants or checks which must be presented to the officer so authorized to issue warrants payable out of the County Treasury or County Depository."

It will be noted from the above that warrants can be drawn by only the Judge of Probate or Chairman of the Board of Revenue or other like governing body, or such officers as may be designated by such Board. The language of this Section is in the alternative and not in the conjunctive. In my opinion only one officer of the county may draw warrants against the General Fund of the County. This officer may be the Judge of Probate or the Chairman of the Board of Revenue or other like governing body, or such other officer as may be designated by such Board. To hold otherwise would nullify the purpose of the statute which allows one party to be constantly familiar with the financial status of the General Fund by knowing the exact number of warrants drawn against said fund. In cases where the claims do not have to be approved by the Board, the officer who was heretofore authorized to issue warrants must now issue orders for warrants which must be presented to the one officer authorized to issue warrants against the General Fund payable out of the County Treasury or County Depository. **Quarterly Report of the Attorney General, Vol. I. p. 46.**

The premises considered, it follows that your inquires must be answered in the negative with the exception of the resolution concerning witness certificates when same are payable out of the Fine and Forfeiture Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. R. L. Mosley,
Clerk of Circuit Court,
Fayette, Alabama.

Justice of Peace entitled to fee of 25c for acknowledging complaint and 50c for issuing warrants returnable to County Court to be collected like other costs, even though case is nol prossed or defendant found not guilty.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of December 15, 1936 in which you submit an inquiry as follows:

"Would you kindly give me a ruling as to whether or not Justice of Peace are entitled to 75c for issuing warrants and acknowledging complaints in cases before County and Circuit Courts, where the cases are either nol prossed or defendants found not guilty. I am referring to cases that the Justice of Peace made returnable to either the Circuit or County Courts."

It is my opinion that a Justice of Peace who acknowledges a complaint and issued a warrant returnable to the County Court is entitled to a fee of 25c for acknowledging the complaint and a fee of 50c for issuing the warrant made returnable to the County Court. These fees are fixed by 3753 of the 1923 Code of Alabama.

I refer you to Section 3754, Code of Alabama, 1923, which reads as follows:

"3754. Same; how taxed and collected.—In prosecution before a Justice of the Peace where the case is not taken to the Circuit Court by appeal, or otherwise, the fees above specified, for such services as may be rendered in the case, must unless otherwise provided, be taxed by him as costs, and collected by execution, as in cases tried in the County Court; and, in all other cases, must be certified by him to the Court to which the proceedings are removed, **or to which the process is returnable, and there taxed and collected like other costs.**"

The Justice of the Peace is entitled to the foregoing fees on complaints and warrants made returnable to the County Court to be collected like other costs, even though the defendant may be acquitted.

There is no authority of law for a Justice of Peace to issue a warrant returnable to the Circuit Court.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1937.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Fees and costs accruing subsequent to sentence to work out fine and costs in misdemeanor cases are not lawful charges against the State under Section 3667 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of August 20, 1936, in which you state that this office has rendered conflicting opinions as to whether the State of Alabama can be lawfully charged under Section 3667 of the 1923 Code of Alabama for officers' fees accruing subsequent to judgement of the Court imposing punishment and a sentence to work out the fine and costs for the commission of a misdmeanor. You cite the following opinions issued from this office:

Dec. 9, 1927	1926-28	PP 386
May 15, 1931	1930-32	PP 282
Apr. 21, 1932	1930-32	PP 791
June 13, 1932	1930-32	PP 877
Oct. 4, 1932	1932-34	PP 370
Nov. 15, 1933	1932-34	PP 426

Office Edition
1934-1936

Book No. 4-A	PP 207
Book No. 5-A	PP 293
Book No. 6-A	PP 223
Book No. 6-A	PP 227

Quarterly Reports

Oct. Nov. and Dec. 1935	PP 189
Jan. Feb. and Mar. 1936	PP 118
Apr. May and June 1936	PP 205
Apr. May and June 1936	PP 145

You give a statement of facts that a defendant after conviction and sentence for a misdemeanor took an appeal to the Court of Appeals; that the Court of Appeals affirmed the sentence; that the Defendant failed to appear within fifteen days and a forfeiture was entered against his bond and the Defendant is arrested and committed to jail; and that the Defendant is later received by the Convict Department and begins serving his time. You list certain items of cost, including a forfeiture, a capias, record for the Court of

Appeals, guard fee, and a fee for executing the capias, and you ask this office for an opinion clarifying other opinions as to whether the State can lawfully pay these fees as provided by Section 3667 of the 1923 Code of Alabama.

I have investigated the opinions which you mention in your letter and I agree with you that there is a conflict which should be eliminated by a decision of this office as to which of the opinions referred to should be adhered to as a correct statement of law.

It is my opinion that all fees and costs to officers which accrue subsequent to judgment and sentence on a misdemeanor charge for the fine and costs are not a lawful charge against the State of Alabama under Section 3667, of the 1923 Code of Alabama.

All opinions or parts of opinions in conflict with this opinion are hereby respectfully overruled and/or modified to conform to this opinion, and each of the foregoing citations of opinions which are mentioned above not in harmony with this opinion is hereby modified and/or overruled to conform to this opinion.

The Legislature of 1927 passed an Act, Number 72, Acts of 1927, page 52. by the terms of which each of the counties of the State of Alabama is given an opportunity to deliver to the State Board of Administration of Alabama all county convicts who are sentenced to hard labor for the county. It is further provided that the State Board of Administration shall take these county convicts, work them, and make an accounting to the County annually of all net earnings of these county convicts. This Act also imposes upon the State Board of Administration the duty paying to all proper county authorities the items of cost provided in Section 3667 of the 1923 Code of Alabama. It is contemplated by this Act that the State of Alabama shall receive service from these convicts, but it was not the intention of the Legislature that the State of Alabama should profit through the transactions, and for that reason Section 6 of the Act provided that all net earnings of the county convicts should be paid to counties to the credit of the Fine and Forfeiture Fund in the County.

It is my opinion that the Legislature at the time had in mind that on proper resolution by each County the State Board of Administration should be compelled to relieve the County of the burden of working the convicts. The Legislature was cognizant that the convict could be sentenced to hard labor only for the fine and costs accrued at the time of the sentence and that he could not be sentenced for any costs accruing subsequent to the day the sentence to hard labor for fine and costs was imposed. It well knew that the state of Alabama would be entitled to the labor of the convict only for the period of time covered by the sentence and judgment of the Court. Well knowing this fact, the Legislature provided that the net earnings of the convict should be paid to the County. The Legislature provided that all items of costs authorized to be paid under Section 3667 of the 1923 Code of Alabama should be paid to the proper officers. It is my opinion that these costs referred to only such items that had accrued at the time of sentence and for which the convict was sentenced to perform hard labor.

My conclusion that the items of costs to be paid under Section 3667, of the 1923 Code of Alabama are confined to those items which had accrued at the time of the sentence is strengthened by the provision of Act Number 72, supra, Section 6, directing all net earnings to be paid over to the

County to the credit of the Fine and Forfeiture Fund, and further by the amendment of February 18, 1927, General Acts of 1927, page 45, to Section 4039 of the 1923 Code of Alabama, which provides that "it (the surplus) shall further apply to the fees of officers of the trial court, arising on an appeal, in cases where the Defendant has appealed from a conviction the punishment fixed being otherwise the imprisonment in the State penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of an execution 'No Property Found.'" The amendment to Section 4039 of the 1923 Code of Alabama, General Acts of 1927, page 45, and Act Number 72, General Acts of 1927, page 52, were both introduced in the Senate and were both approved on February 18, 1927. It is my opinion that the Legislature had in mind that the State of Alabama should be charged under Section 3667 of the 1923 Code of Alabama with items of costs which had accrued at the time of the sentence for a misdemeanor and if there was any profit made by the convict, it should be paid by the State to the Fine and Forfeiture Fund of the County, and any subsequent costs accruing by reason of appeal should be a proper charge against the Fine and Forfeiture Fund. The Legislature evidently wanted the officers entitled to costs by reason of appeal to have some source of obtaining pay therefor, and for that reason it amended Section 4039 of the 1923 Code of Alabama so as to authorize these fees to be lawful charge against the Fine and Forfeiture Fund and it also provided in Act Number 72, which authorizes State Board of Administration to work County convicts, to pay to this Fine and Forfeiture Fund the net earnings of the convict.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 4, 1937.

Hon. Crews Johnston,
County Solicitor,
Barbour County,
Clayton, Alabama.

Licenses: Party operating automobile repair shop who also operates battery bench used exclusively for recharging of batteries, held liable for repair shop license (Schedule 13 of 1935 Revenue Laws) only.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 5, 1936, in which you request my opinion as follows:

"We have a man in our County Court charged with failing to procure a license for operating a battery shop as provided by Schedule 20 of the 1935 Revenue Code. The facts in the case are these:

"This party operates an automobile repair shop and has taken out a license therefor as provided by schedule 13 of the Revenue Code. In connection with his repair shop he has a battery bench and

charger which he uses in charging dead batteries. He does not repair batteries other than recharge them.

"Will you kindly give me an opinion as to whether or not this man is liable for and subject to license under schedule 20?"

In my opinion a party operating an automobile repair shop and paying the license prescribed by schedule 13 of the Revenue Act of 1935, who also operates a battery bench and charger used exclusively for the recharging of batteries is not liable for the Battery Shop license levied by Schedule 20 of said Revenue Act.

I call your attention to an opinion of this office rendered under date of June 23, 1936, to Hon. W. W. Hill, Judge of Probate of Montgomery County, Alabama, (Quarterly Report of Attorney General Vol. III, page 184) wherein is found the following statement:

"Moreover, the repair of motor vehicles or trucks can well be extended to the repair of batteries, a battery being a part of the standard equipment of a motor vehicle."

Inasmuch as the party mentioned in your inquiry has procured the license required by law of those persons engaged in **the repair of motor vehicles**, and inasmuch as we have heretofore held that a battery is an integral part of such motor vehicles, I am of the opinion that said party need procure no other license than that prescribed by Schedule 13 which is as follows:

"SCHEDULE 13. For garages or shops where automobiles are repaired, painted, trimmed or welded for the public; Each shop where the work is done by one man, five dollars ($5.00); each shop where the work is done by two men, ten dollars ($10.00); each shop where the work is done by more than two men shall pay a license of ten dollars ($10.00), and an additional license of five dollars ($5.00) for each workman in excess of two so employed. Where garage or shop owners do work in shops they shall be counted as workmen. Provided the maximum number of men employed at any time during the license year shall be the basis of computing the license due."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 4, 1937.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Mortgages — No valid satisfaction of mortgage, as provided by Section 9023 of 1923 Code of Alabama, without attestation by judge of probate or his clerk.

Opinion by Assistant Attorney General Kohn.

I wish to acknowledge receipt of your letter of January 6, 1937, in which you state:

"The question of what is a valid mortgage satisfaction as outlined in section 9023 of the Code of 1923 has been called to my attention by one of our leading Tuscaloosa Attorneys and I have been requested by him to secure from you an opinion, the facts of which are as follows:

" 'A power of Attorney has been written and duly executed and acknowledged before a Notary Public and filed for record and duly recorded in this office. The Attorney in fact has marked the mortgage satisfied in full and did not request the Probate Judge to attest this satisfaction.' "

You request my opinion:

"Please give me an opinion as to whether or not this is a valid satisfaction under Section 9023 of the Code of 1923."

In my opinion your question should be answered in the negative.

The question of whether the satisfaction of a mortgage without attestation by the probate judge or his clerk amounted to a compliance with Section 9023 of the 1923 Code of Alabama, was passed on by our Supreme Court in the case of Lewis v. Cannon, 216 Ala. 515, 113 So. 577.

I quote from that case as follows:

"The requirement of attestation by the judge of probate, or his clerk, was designed, of course, to prevent unauthorized or fraudulent cancellations, and because, without such attestation, subsequent purchasers and incumbrances are not affected by the notice of payment or satisfaction, the statute intends to provide to the end that the owner, after he has paid or satisfied his debt, may be free to deal with his property as unincumbered. The entry of satisfaction alleged in count 2 was not a compliance with the statute, and defendant, on proof of the allegation, was liable as provided by section 9024 of the Code."

It is my opinion that under Section 9023 of the 1923 Code, no destinction is made between the satisfaction of a mortgage by the mortgagee himself, or by his attorney in fact, as the statute requires the attestation of the probate judge or his clerk in both cases.— **Biennial Report of Attorney General, 1928-1930. p. 811.**

The requirements provided by Section 9023 of the 1923 Code apply only to satisfactions in response to the demand made and not the voluntary entry of satisfaction of the mortgage. — **Blalock v. Windham,** 229 Ala. pp. 413, 157 So. 486; **Burns v. Burns,** 228 Ala. 61, 152 So. 48; **Sullivan v. Williams,** 210 Ala. 363, 98 So. 186.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. G. H. Howard,
Judge of Probate,
Elmore County.
Wetumpka, Alabama.

Licenses - Hardware store selling electrical wiring supplies and electric irons liable for license under Schedule 56 of Section 348 of the Revenue Act of 1935 (General Acts 1935, p. 460).

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of January 20, 1937, in which you state that a hardware store, doing general hardware business, also sells electrical wiring supplies (electrical wiring fixtures) and electric irons. You further state that these are all the electrical supplies sold by said store and that the sales are made mainly to contractors for wiring buildings, houses etc. The store does not do any contracting itself.

You request my opinion as to whether or not said hardware store would be liable for the license required by Schedule 56 of Section 348 of the Revenue Act of 1935, (General Acts 1935, p. 46).

I am of the opinion that your inquiry should be answered in the affirmative.

The license schedule under consideration provides as follows;

"Schedule 56. For each dealer in electric, gas or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, and/or for each electrical or gas repair, or **electrical** or gas **supply shop:** In cities of one hundred thousand inhabitants or over, thirty dollars ($30.00); in cities of fifty thousand and less than one hundred thousand inhabitants, twenty dollars ($20.00); in cities of ten thousand and less than fifty thousand inhabitants, ten dollars ($10.00); in places of less than ten thousand inhabitants, whether incorporated or not, five dollars ($5.00)." (Italics supplied).

The question then presents itself as to whether the selling of electrical wiring supplies and electric irons by the hardware store would bring it within the term "electrical supply shop." It appears that the store in question is handling electrical supplies to such an extent as to constitute an electrical supply shop. This is true although such may not be its main line of business.

This office has heretofore ruled that one taking out a license to sell specific articles is likewise liable for store license if operating a store. — **Quarterly Report of Attorney General, Vol. I. p. 358.** The converse is likewise true. The general store license does not obviate the necessity of a specific license if one is required for a specific purpose or selling specific articles.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. D. M. Weakley,
Superintendent,
Alabama Boys' Industrial School,
Birmingham, Alabama.

Alabama Boys' Industrial School - Not authorized to pay premiums on property and liability insurance on cars and trucks owned by school.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 28, 1936, which is as follows:

"Please advise me if you are of the opinion that the Board of Directors of the Alabama Boys Industrial School have the authority to carry property and liability insurance on cars and trucks owned by the School. May the premiums on such policies be paid out of the regular appropriation made to the School?"

In answer to your inquiry, I am of the opinion the Alabama Boys' Industrial School is without authority to pay premiums on policies of property and liability insurance on cars and trucks owned by the School.

This office has heretofore ruled that there is no authority for County Boards of Education to pay for liability insurance on school buses, on the theory that suit could not be maintained against them and such would be a needless expenditure of school funds. **Biennial Report of Attorney General,** 1932-34, page 458. The same principle as set out in said opinion is applicable to your inquiry as there could be no liability against the Alabama Boys' Industrial School, an agency of the State, for any damage done to property or person by negligence of the drivers of cars or trucks owned by said school.

In connection with this inquiry I also wish to refer you to an opinion of this office found in **Biennial Report of Attorney General,** 1932-34, page 486 for your consideration.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. J. T. McPherson,
Clerk of County Commission of
Jefferson County,
Jefferson County Courthouse,
Birmingham, Alabama.

Bonds of County officials — Jefferson County Commission authorized under the Local Acts of 1933, page 203 to pay premiums on bonds of deputy clerks.

Definite authority to pay premiums on bonds of deputy clerks is provided by General Acts 1931, page 557 and Local Acts 1932, page 84.

Opinion by Assistant Attorney General Small.

An opinion addressed to you under date of September 16, 1935, is hereby withdrawn and the following opinion is substituted therefor.

You requested my opinion as follows:

"Mr. P. B. Singleton, State Examiner, has questioned the authority of the County Commission to pay premiums on bonds of Deputy Clerks under Act approved April 20, 1933, General Acts 1933, page 203.

"Kindly also give your opinion on like items paid prior to April 20, 1933."

In reply, I wish to advise that in my opinion Sections 18 and 20 of the General and Local Acts, Extra Session 1933, page 205 are pertinent to the instant question. They provide respectively as follows:

"Section 18. That when in the judgment of the Court of County Commissioners, Board of Revenue or like governing body of any county it is considered necessary to the protection of the public interests, such governing body may require any county employee or any clerk, deputy or employee in any county office to give bond in such amount and with such surety as may be approved by said governing body, unless such bond is already provided for in this act."

"Section 20. The premiums on all bonds provided for in this Act, when made by surety companies, shall be paid by the respective counties out of the general funds of said county, except that the premiums on the bonds of Superintendent of Education and of County Treasurer of public school funds shall be paid by the Board of Education of said County out of the three mill school tax and the premiums on all bonds of $1000.00 or less shall be paid by the officer making said bond."

It will be noted that Section 18 vests the Court of County Commissioners with authority to require bonds from deputy clerks or employees in any county office, such bond to be made in such amount and with such surety as may be approved by the County Governing Body unless such bond is already provided for in this Act. Under the provisions of this section, the county governing body may exercise its discretion concerning the requirement of a bond of deputy clerks as well as the amount thereof.

Section 20 provides that the payment of the premiums on such bonds, when required by the county governing body, shall be paid from the general fund of the county.

The authority vested in the County Commission to require these bonds of deputy clerks is an authority delegated by the Legislature. It, therefore, follows that when such bonds are required by the county governing body, they are such bonds as are required by law. The county governing body, therefore, has authority to pay the premiums on the bonds of deputy clerks as provided for in the General and Local Acts of 1933, page 203.

In reply to your second request, in which you ask for an opinion on like items paid prior to April 20, 1933, I wish to refer you to Local Acts of Alabama, Extra Session 1932, page 84, Section 10 which provides, in part, as follows:

"That the premiums on all such bonds of both officers and employees shall be payable out of the funds of the county."

I wish to further refer you to the General Acts of 1931, page 557, Section 2, which provides as follows:

"Section 2. That such boards may at its discretion each year require any or all County employees who are intrusted with the handling of public funds to give bond in such amount and with such surety as it may require, and that the premium on such bonds shall be paid out of the County Treasury."

I wish to further refer you to the following opinion rendered by this office containing matter explanatory of or pertinent to the questions asked in your request:

Biennial Report of Attorney General, 1928-1930, p. 74;

Biennial Report of Attorney General, 1926-1928, p. 355;

Opinion of the Attorney General to Hon. J. M. Money, Judge of Probate, Lawrence County, Book 17, Office Edition, p. 236.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Officers—County Treasurer, or Treasurer appointed in lieu of County Depository, cannot act as clerk of the Board of Revenue or Court of County Commissioners.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 19, 1936, which is as follows:

"Please refer to Section 300-324 Inc., Code of 1923, and amendments thereto and advise me as follows:

"1. Where a person is elected under the general law to the office of Treasurer as per Section 300, could such Treasurer also be and act, as Clerk of the Board of Revenue or Court of County Commissioners?

"2. When a person is appointed Treasurer in lieu of a Depository as per Section 322, could such person also be and act as Clerk of the Board of Revenue or Court of County Commissioners?"

I am of the opinion that both of your inquires should be answered in the negative.

The employment of a clerk of the Board of Revenue or Court of County Commissioners under the general law is governed by Section 157 of an

Act approved August 23, 1927, (General Acts 1927, p. 391), which employment is limited to duties concerning roads and bridges. **Biennial Report of Attorney General, 1930-32, p. 667.** The clerk employed thereunder is not, in my judgment, an officer. He is merely an appointee of the Board who has no term of office, no paid salary and may be removed at will. He is in my opinion a mere contractor. In other words, his employment is by virtue of a contract with the county.

The questions now to be determined are: (1) Can a County Treasurer under Section 300, Code of 1923, make such a contract of employment with the County, and (2) Can a person appointed Treasurer in lieu of a County Depository under Section 322, Code of 1923, take such a contract of employment with the County?

Section 5024, Code of 1923, provides as follows:

"5024. (7434) (5117) (3932) (4169) COUNTY OFFICER INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS. Any judge of probate, Tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

Said section specifically enumerates County Treasurers, and prohibits same from taking any contract for work or service with the county. It follows that your first inquiry should be answered in the negative.

The section above quoted includes "any other county officer" besides those officers specifically enumerated. The question then presents itself as to whether or not a person appointed Treasurer in lieu of a County Depository under Section 322, would be considered in the classification of "any other county officer" within the contemplation of Section 5024, supra. In discussing the status of such an appointee the Supreme Court of this State in the case of **Jenkins vs. State ex rel Watson,** 219 Ala. 554, 123 So. 31, states as follows:

"We think, and so hold, that whether the individual so selected be termed a "treasurer" or "depository" he is the acting treasurer and is such a public officer or claimant to such office as to subject him to removal by quo warranto, under Section 9932 of the Code of 1923, when unlawfully holding the same. He is not a mere contractor. State ex rel vs. Roberts, 203 Ala. 325, 83 So. 49; Michael vs. State ex rel Welch, 163 Ala. 425, 50 So. 929."

Since the appointee in question is a public officer and his duties relate to only the county, he is, in my opinion, a county officer. And being a county officer he comes within the classification of "other county officers"

as used in Section 5024, supra. Therefore, it follows that he is prohibited from taking a contract for work or services of the county; and your second inquiry should be answered in the negative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1937.

Hon. C. E. Sellers,
Tax Collector,
Pike County,
Troy, Alabama.

Elections—Poll Tax—All persons permanently disabled whose taxable property does not exceed $500.00 exempt from payment of poll tax.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 22, 1937, which is as follows:

"(1) I would like to know under the new law if a man permanently and totally disabled is exempt from payment of poll tax.

"(2) A man who loses one arm at the shoulder is he exempt?"

The exemption from payment of poll tax of persons permanently disabled is now governed by subsection (g) of Section 2 of the Revenue Act of 1935. (General Acts 1935, pp 258). This provision is the same as subsection 7 of Section 3022, Code of 1923. The exemption from the payment of poll tax applies to all persons permanently disabled whose taxable property does not exceed $500.00.

The party claiming the exemption will be exempt only from the time he first suffered his permanent disability. He would be due all poll tax since the adoption of the Constitution of 1901 to the time he became permanently disabled.—**Biennial Report of Attorney General, 1932-1934, p. 227.** Moreover, this exemption applies only to persons whose taxable property does not exceed $500.00 at the time of claiming the exemption. This being true, a party who is permanently disabled should file claim for exemption each year because his taxable property may be in excess of $500.00, and if so he would not be exempt from the payment of poll tax. **Biennial Report of Attorney General 1930-1932, p. 844.**

Concerning the proof of disability, this office has held that such is a matter to be determined by the Judge of Probate. In this connection, I wish to refer you to an opinion found in Biennial Report of Attorney General 1926-1928, p. 523. A voter claiming the disability has the burden of showing that such disability began before the tax became due and that his taxable property did not exceed $500.00 at the time. Such disability must be one either physical or mental which materially impairs the voter's aptitude or capacity for earning a livehood, no recurrent or intermittent maladies will bring a person within the exemption of this section.—**Shepherd v. Sartain,** 185 Ala. 439, 64 So. 57.

Definintely answering your second inquiry, I am of the opinion that the loss of an arm would not of itself exempt a voter from the payment of poll tax as far as physical disability is concerned. However, such, when taken in connection with other circumstances, may be sufficient to authorize the exemption. As above stated, this is a matter to be determined by the Probate Judge by an application of the rule laid down in the case of Shepherd v. Sartain, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 6, 1937.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Counties - No authority to pay for copy of testimony in habeas corpus proceeding to be furnished Solicitor.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 19, 1937, which is as follows:

"Mr. John Robinson, Attorney at Law here, advises me that he had a conversation with you over long distance telephone Monday night regarding your authorization of payment of the cost of securing a transcript of certain testimony of a habeas corpus proceeding in the case of the State vs. Lee James.

"It is my understanding that the Solicitor is desirous of a copy of the testimony of this proceeding, and that there is a provision whereby the Commissioners Court can pay the reporter for this transcript.

"As we have not had a matter of this kind to come before us we do not know of any authority that would pay a claim of this kind."

I am of the opinion that your inquiry should be answered in the negative. I find no authority whereby the County is authorized to pay for the expenditure in question.

This office has heretofore ruled that there is no authority for paying the Court Reporter for taking testimony in a habeas corpus proceeding. **Biennial Report of Attorney General, 1928-30, p. 1025; Quarterly Report of Attorney General, Vol. II, p. 198.**

We have also ruled that the Court Reporter is not required to furnish the State Solicitor with transcript of testimony taken at the trial of criminal offense, unless he is paid lawful charges therefor. **Opinion to Chief of Alabama Highway Patrol, on February 3, 1937.**

It will be seen from the foregoing that the Court Reporter is not required to furnish copy of transcript to the Solicitor, unless he is paid there-

for. However, I find no authority of law which will authorize the County to make such an expenditure. It is well settled that the County may expend its funds only for purposes authorized by law or by necessary implication.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1937.

Mr. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Exemption from ad valorem taxes of real estate owned by Masonic Lodge in Jefferson County is not authorized because real estate is not used in accordance with exemption laws. Act No. 194, Section 2, General Acts of Alabama, 1935, page 256.

Opinion by Assistant Attorney General Simmons.

My dear Sir:

Reference is made to your inquiry in which you submit as follows:

"The Grand Lodge A. F. and A. M. Prince Hall Affiliation (negro Masonic Lodge) owns

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in Jefferson County. It has one negro shack on it. The property was purchased as a site for old negro Masons but the Lodge has never had sufficient funds to carry out the program. They request exemption from taxation under the above statement.

"Please advise me if this property is exempt from taxation."

It is my opinion that the property described in your letter is not entitled to be exempted from the payment of ad valorem taxes.

The statement of facts presented in your letter indicates that the Masonic institution purchased the property with a view to using it for the purpose of housing old negro Masons. The intended use is charitable, but such use has not begun as yet, and there is no exemption from ad valorem taxes under the laws of Alabama until the property so purchased is actually put in use for charitable purposes. The mere fact of ownership coupled with an intention to use the property for charitable purposes is not sufficent under the laws of Alabama to warrant an exemption from taxes. The property must be occupied and made use of for charitable purposes or for such other purposes which are detailed in Section 2, General Acts of Alabama, page 257. The use of this property determines the right under the laws of Alabama to tax exemptions. State et al vs. Church of the Advent 208 Alabama Reports, page 632.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 13, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Local Acts, 1882-3, page 300. St. Clair County—Fine and Forfeiture Claims and Funds.

1. Circuit Clerk, St. Clair County, has no legal right to retain money received from defendants in payment of fines and pay such fines to County Treasurer with his own claims against the Fine and Forfeiture Funds.

2. Clerk of Circuit Court, St. Clair County, authorized and required to accept fine and forfeiture claims, which show registration within one year, in payment of fines and forfeitures.

3. Clerk of Circuit Court, St. Clair County, is not authorized to refuse acceptance of claims against the fine and forfeiture fund offered in payment of fines until the claims have been checked by County Treasurer and found to be in line of payment.

4. There is no statute of limitations against payment of registered fine and forfeiture claims in St. Clair County.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter in which you submit the following:

"I am enclosing a copy of a local act regulating the fine and forfeiture fund of St. Clair County. This is Act. No. 221, approved February 16, 1883, found on page 390 of the Acts of Alabama, 1882-1883.

"In your opinion just released, dated January 15,, 1937, you rule that fines and forfeitures in St. Clair County may be paid in scrip by authority of this act which you hold has not been repealed 'By any provisions of the Code of 1923 nor the adoption of the Constitution of 1901' quoting the recent decision of the Court of Appeals in the Blount County case, Reid v. Wallace, 168 So. 900.

"There is a procedure consistently indulged in by the Clerk relating to the above and which is not covered by this opinion just received. This procedure is this: the defendant would pay his fine in money and the clerk would retain the cash thus received and pay the fine to the treasurer with scrip, the scrip thus substituted being claims of the clerk. This practice results in very little actual cash being in the fund.

"Attention is invited to Section 1 of the 1883 Act providing for the registration of claims, from which the following is quoted:

> '... and no claim payable out of said fund shall, in any manner, be received or paid, until the same shall have been registered, and said claims shall be paid by the county treasurer, or any other person acting as such, in the order of their registration.'

"Please advise:

"1. Has the clerk the legal right to retain money received from defendants in payment of fines and pay such fines to the treasurer with his claims?

2. If claims are to be 'received or paid... in the order of their registration' should such claims accepted by the treasurer in payment of fines, under conditions mentioned in question No. 1, be subject to the provisions as regards registration?

3. If it is held that accepting claims in payment of fines is equivalent to such claims being paid should the clerk not refuse to accept these claims offered in payment of fines until they had been checked by the treasurer to ascertain if they were in line for payment as regards registration?

4. When claims have been registered with the treasurer is there any statute of limitation as to their payment? If so, what is the limitation?

"The above information is essential to definitely clarify the situtation governing the operation of the fine and forfeiture fund of St. Clair County and your early advice will be appreciated as a new clerk has just been appointed to succeed the late clerk, Mr. A. G. Teague."

Your first question should be answered in the negative. The clerk of the Court has no lawful authority to appropriate to his own use money which has been paid to him in settlement of a fine and then take his own claims against the fine and forfeiture fund and turn them in to the County Treasurer in settlement of the fine.

Answering your second question, it is my opinion that the Clerk of the Circuit Court in St. Clair County is authorized and required to accept claims against the fine and forfeiture fund, properly registered with the County Treasurer within one year, in payment of fines and forfeitures. If the claims have not been registered within one year in the manner required by the Act, the Circuit Clerk would not be authorized to accept such unregistered claims in payment of fines and forfeitures. I invite your attention to Section 6 of the Act, which I quote as follows:

"Section 6. Be it further enacted, That all the witness tickets and claims due from, and payable out of, the fine and forfeiture fund, shall be registered with the county treasurer, or any other person acting as such, within twelve months from the time they become payable, or they shall be forever barred, and the same shall not be registered, nor received in payment of any debt due the county; Provided, however, That nothing in this Act shall affect in anywise the claims already registered against the fine and forfeiture fund of said county."

This Section specifically requires that the claim shall be registered with the County Treasurer, or other persons acting as such, within twelve months from the time they become payable, otherwise they shall be barred, shall not be registered nor received in payment of any debt due the County.

With reference to your third question, it is my opinion that the Clerk cannot lawfully refuse to accept claims against the fine and forfeiture

fund of your County in payment of fines until the claims have been checked by the County Treasurer for the purpose of ascertaining if such claims are in line of payment. I am not impressed that there is any such inhibition in the statute. I refer you to Section 4 of said Act and, as a convenience, I quote that Section as follows:

> "Section 4. Be it further enacted, That State witness tickets, payable out of the fine and forfeiture fund. solicitor's, sheriff's and clerk's claims, payable out of said fund, shall be receivable for any fine and forfeitures due to the county as the value expressed by said ticket and officers' claims and when the same shall be paid into the county treasury, bank, or other place of deposit, the county treasurer, or any other person acting as such, shall mark on his registry of said claims, that the same is paid, the date, and to whom."

The foregoing Section says that the enumerated claims shall be receivable for any fines and forfeitures due the County, and there is no condition in said Section, or otherwise in the Act, which conditions such acceptance on the claims being in line of payment. The Act provides without reservation in my judgment, that registered claims against the fine and forfeiture fund shall be receivable for fines and forfeiture due the County. There is an additional mandate in Section 4 that the registry of such claims as have been received shall be marked so as to show that the claims have been paid, the date, and to whom.

In response to question 4 of your inquiry, there is no statute of limitations which bars registered claims against the fine and forfeiture fund in St. Clair County from payment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 17, 1937.

Hon. T. B. Pearson,
County Superintendent of Education
Washington County,
Chatom, Alabama

Schools—Custodian of county school funds may also be clerical assistant to county superintendent of education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 29, 1937, which is as follows:

> "We are paying our custodian a salary of ten dollars ($10.00) per month for clerical assistance to the county superintendent. Kindly advise if this is a legal expenditure of school funds."

I am of the opinion that your inquiry should be answered in the affirmative.

The provision for the employment of clerical assistance to the county superintendent of education is found in Section 169 of the School Code of 1927. (See Biennial Report of Attorney General, 1932-1934, p. 276).

I find no provision of law which would prevent the custodian of county school funds from being employed as a clerical assistant to the county superintendent of education. Moreover, Section 1 of Act No. 507, S. 424, approved September 13, 1935, (General Acts 1935, p. 1090), dealing with the custodian of county school funds, specifically provides that the said custodian may be the secretary to the county superintendent of education.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 17, 1937.

Hon. Gordon Persons, Chairman,
Rural Electrification Authority,
Capitol.

Electric Membership Corporation, not being an instrumentality of the State or Federal Governments, is subject to deed tax imposed by Schedule 46, Sec. 348, Revenue Laws, 1935.

Opinion by Assistant Attorney General Simmons.

My dear Sir:

I have your letter of January 25, 1937, in which you submit an inquiry as follows:

"This Authority requests a formal opinion from your office on the matter of the necessity of the Probate Judges charging a deed tax to various electric membership corporations in the State in connection with the recording of right-of-way easements.

"It appears that the State law makes a deed tax applicable to any conveyance of land or any interest in land, and an easement is an interest in land. On the other hand, this deed tax would not be applicable in the case of an instrumentality of the State or Federal Government. It has been previously held that these electric membership corporations should be placed in the same classification as a municipal corporation insofar as the non-jurisdiction of the Public Service Commission was concerned, and for the protection of the different probate judges throughout the State we request advice from your office as to whether or not this deed tax should or should not be paid."

It is my opinion that the conveyance mentioned in your letter as having been made to the electric membership corporations are subject to tax when offered for record, as provided by Schedule 46, Section 348, Revenue Laws of Alabama, 1935.

I have examined Act No. 45, General Acts of 1935, page 100, which authorizes the formation of electric membership corporations in Alabama, and I do not find any provisions in said act which identifies a corporation organized thereunder as an instrumentality of the State of Alabama. I can find no law which makes a corporation of this kind an instrumentality of the Federal Government. A corporation organized under this act

has all the attributes of a private corporation, although it is not organized for the purposes of profit.

It is, therefore, my opinion that the instruments mentioned in your letter, when filed for record by the corporation, are subject to taxes imposed upon like instruments filed by an individual.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 17, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

License - License Schedule 56, General Acts of Alabama, page 460, does not apply to stores where electric light bulbs, standing or reading lamps are sold.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which I quote as follows:

"Schedule 56 of Section 348, Revenue Code, provides a license for the handling of electrical supplies. Please advise me if, in your opinion, this license applies to a person operating a place of business that handles merchandise such as groceries and dry goods.

"The examiners have found a case where a chain store is handling electric light bulbs, standing or reading lamps. Would such license apply to such business?"

It is my opinion that your question should be answered in the negative.

Schedule 56 enumerates certain electrical appliances and articles of merchandise and subjects them to a license tax. It then proceeds to levy a license tax on an electrical supply shop.

I think that electric light bulbs, floor and reading lamps are electrical gadgets or appliances, but are not electrical supplies. If it had been the intention of the legislature to levy a tax on the articles mentioned in your letter, it occurs to me that they would have enumerated these appliances as they did electric water heaters, electric stoves, and electric refrigerators. The articles enumerated in this schedule might be construed as household electrical equipment and likewise the articles in your letter might be so classified.

I, therefore, hold that a store handling the electrical goods mentioned in your letter is not subject to the license tax imposed by Schedule 65, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 19, 1937.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

License- Schedule 63, Revenue Act of Alabama 1935, page 462. Does not apply to the sale of blank metallic ammunition.

Opinion by Assistant Attorney General Simmons.

My dear Sir:

Reference is made to your inquiry in which you asked if the person who sells blank metallic ammunition would be liable for a fireworks license under Schedule 63, of the Revenue Code of 1935, page 462.

It is my opinion that the license schedule mentioned in your inquiry has no application to the sale of blank metallic ammunition. Ammunition is defined as "materials which are used in the discharge of firearms, and ordinance of all kinds." Corpus Juris Vol. 2, page 1326. Blank metallic cartridges are ammunition even though there is no lead or metallic bullets in them. The blank cartridge may be discharged in a firearm, and if fired at close range, the wadding in the blank cartridge is capable of producing some injury. A bullet, of course, would produce more serious injury. Whether a cartridge is loaded with a bullet or with some other substance, it is ammunition just the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 19, 1937.

Hon. A. L. Hasty,
Judge of Probate,
Marengo County,
Linden, Alabama.

License—Schedule 146, Revenue Act of 1935, page 499. Rolling store operator is entitled to license for one half year if he commences business after the first day of April in any year.

Opinion by Assistant Attorney General Simmons.

My dear Sir:

I have your communication in which you submit an inquiry as follows:

"Please refer to schedule 146, page 499, Acts 1935, and advise at your earliest convenience, whether or not half-year license for rolling store can be issued if such business commenced after April 1st?"

It is my opinion that your inquiry should be answered in the affirmative.

Section 368, Revenue Act of Alabama for 1935, page 5603, said:

"Unless otherwise provided, if any business licensed by this act shall commence after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases, the license shall be taken out for the full term of one year unless a shorter term is fixed by the provisions of this act."

I have examined Schedule 146, supra, and I can find no inhibition therein against issuance of a half year license to the operator of a rolling store. It is my conclusion that after April 1st of any year you are authorized to issue a half year license to the operator of a rolling store.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 19, 1937.

Hon. T. V. White,
Clerk of the Sumter County
Board of Revenue,
Livingston, Alabama.

1. County Board of Revenue of Sumter County may allow claims after disallowance but after such allowance has no authority to disallow the claim.

2. Board of Revenue of Sumter County must issue warrant to the owner of the claim and to no one else unless authority therefor be of record in the court.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your inquiry which is substantially as follows:

One Paul B. Smith, on July 9, 1928, filed his claim properly itemized and sworn against the county for $500.00; that, on November 6, 1929, the Board made or caused to be made a minute entry disallowing the claim; that on July 7, 1930, the Board caused a minute entry to be made as follows: "Whereas, Paul B. Smith filed a claim against the County of Sumter for the sum of $500.00 on the 9th day of July, 1928, which was within twelve months of the accrual of the claim, and whereas said claim was rejected by the Board of Revenue at the November 1929 term of said Court, on account of lack of proof, and whereas satisfactory evidence has now been presented to the Board that this claim was and is valid; therefore, be it resolved by the Board of Revenue that this claim be reconsidered and that the same be allowed." You further state that on January 5, 1931, a minute entry as follows was made: "Order that the claim of $500.00 held by the Bank of Scooba against District No. 1 not to be open for payment."

The Local Acts, as amended by Act No. 326, Local Acts of 1919, p. 130, as appeared by Section 4 of the original Act, Local Act of 1919, p. 52, provides "That the Board of Revenue shall have all jurisdiction and powers

which are now or may hereafter be by law vested in the Courts of County Commissioners in this state and by any special law now vested in the Court Commissioners of Sumter County and the several members of the said Board of Revenue shall perform all the duties and services, and exercise all the powers, which are, or may be required by law of the several members of the Court of County Commissioners."

It is my opinion that the Board of Revenue of your County were lawfully authorized to allow the claim mentioned in your letter after its disallowance, provided that it was a valid claim against the County. The disallowance of the claim was not a judicial act, but an executive or administrative act. **Commissioners Court. v. Moore,** 53 Ala. 25; **Converse Bridge Co. et al v. Geneva County,** 168 Ala. 483. With reference to the right of your Board to allow the claim after disallowance, I refer you to an opinion of this office rendered on December 22, 1930, addressed to Clerk, Board of Revenue, Livingston, Sumter County, Alabama. It probably refers to the same claim. You will find this opinion in Biennial Report of the Attorney General, 1930-1932, p. 49.

With reference to the Court being precluded from disallowing a claim which has been allowed, the Supreme Court of Alabama in Commissioners Court v. Moore, 53, Ala. 25, speaking through Justice Brickell, a very eminent jurist, had the following to say:

> "While this is true, after the Commissioners Court has audited and allowed the claim, it has not capacity to retract. It may not recall the admission of the indebtness it has made, and deprive the party holding the claim of the force the law attaches to his audit and allowance. It is an elementary principle, that admission or declaration made by an individual at one time, cannot be withdrawn, or qualified or controlled by counter declaration made at another time. On the same principle and for the same reason, it is not competent for the commissioners court after it has allowed a claim against the county and the term at which the allowance was made has been closed, to withdraw or lessen the force of the allowance. The rights of a person to whom the claim is allowed, has been attached and are not within the control or power of the courts."

An allowance after disallowance is not prejudicial to the rights of the claimant, but disallowance after allowance could be prejudicial to the rights of the claimant. As an example, the claimant, relying upon the allowance, could have parted with his rights to sue the county. Therefore, it is quite reasonable and logical that the courts of Alabama should protect the claimant against a change of decision on the part of the commissioners. As was said in the case of Commissioners Court v. Moore, supra, if the commissioners allow an unlawful claim, protection from payment of the claim may be sought in a Court of Equity.

In view of the minute entry showing that the claim has been allowed by the Revenue Board of your County, it is my opinion that any subsequent effort of the Board to disallow the claim are invalid. Warrant for payment of the claim may issue without regard to subsequent effort on the part of the Board to disallow the claim.

Your letter seems to indicate that the Board wants to pay the claim to someone else other than the original claimant, the other party having

an interest therein. It is my opinion that you are not authorized to pay the claim to any person other than the claimant unless there is of record with the Court an order from the claimant or an assignment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1937.

Hon. H. C. Hood,
Register in Chancery,
Oneonta, Alabama.

1. Blount County—Judge of Inferior Court, held Judge of Juvenile Court by virtue of such office.

2. Blount County—Judge of Inferior Court not entitled to fees or compensation for acting as Judge of Juvenile Court.

3. Inferior Court of Blount County—Supplies not furnished as for Justice of Peace Court.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 6, 1937, in which you request my opinion as follows:

"I have recently been appointed Judge of the Inferior Court of Blount County. Do I become the Judge of the Juneville Court by virtue of this office? If so, who is to furnish the supplies for the office and whose duty is it to pay for the services rendered as Juvenile Judge?

"Whose duty is it to furnish supplies for the Inferior Court?"

Answering your first inquiry, I call your attention to an opinion rendered by this office under date of January 10, 1936, to Honorable R. A. Nash. Deputy Circuit Solicitor, Blount County, Alabama (Quarterly Report of Attorney General, Vol. 2, page 27) in which it was held that the Inferior Court of Blount County has jurisdiction as Juvenile Court under the General Acts of 1931, page 637, as amended by Acts 1932, page 276. In view of this opinion, I advise you that as Judge of such Inferior Court of Blount County, you become Judge of the Juvenile Court of the County.

Your next inquiry is as to whose duty it is to furnish the supplies for the office and pay for the services rendered as such Juvenile Judge. In my opinion you are not entitled to any fees as such Juvenile Judge nor or any suppiles authorized to be furinshed you by the County acting as such judge. Statutes allowing fees to public officers for services performed by them must be strictly construed. Pollard vs. Brewer, 59 Ala. 130; McElderry vs. Abercrombie, 213 Ala. 289.

In Pollard case, supra, we find it stated,

"Those who accept public offices which require them to render services to the State, must take the office cum onere. Rendition of

such service is grauitous, unless by express statutory provision compensation is fixed and an express liability for its payment imposed on the State."

Again, in the McElderry case, supra, we find the following:

"He who accepts public office takes it cum onere and can receive only such salary as is authorized by law."

I advise you that in view of these facts, neither the law creating the Inferior Court of Blount County, nor the general law with reference to Juvenile Courts relating to Blount County, provides for compensation for the Judge of the Inferior Court when acting in such capacity, and you would not be entitled to any fees or compensation for your services as such Juvenile Judge.

With relation to your inquiry as to supplies furnished for the Inferior Court of Blount County, your attention is directed to an opinion rendered under date of September 12, 1931, to the Honorable Birl Brown, Judge of the Inferior Court of Blount County, Oneonta, Alabama. holding that blanks are not to be furnished to the Inferior Court of Blount County. I enclose herewith copy of the above opinion for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1937.

Hon. John S. Golson,
Probate Judge,
Butler County
Greenville, Alabama.

1. The Probate Judge is required to furnish a correct alphabetical list of the qualified electors registered by precinct immediately preceding the Liquor Referendum to be held on March 10, 1937.

2. This list cannot be correct unless it reflects the poll tax payments for the current year and in the event the Tax Collector has not certified the list of poll tax payments in time for the Probate Judge to make up his list of qualified electors, he must avail himself of this information from the records in the Tax Collector's office.

3. Under provisions of Section 402, Code of Alabama of 1923, as amended by Act No. 251, Acts of 1931, page 293, the Probate Judge may employ such clerical assistants as may be necessary for the preparation of said list.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of February 5, 1937, which is as follows:

"I am informed that the law recently passed by the Legislature calling for a referendum on the liquor question has set the date for said election as March 10, 1937.

"As Probate Judge of this County, I am required to deliver to the Inspectors in each precinct a list of the qualified electors of Butler County, Alabama. This duty is required of me under Section 388 of the Code of Alabama 1923. Section 387 of the Code supra deals with what purports to be the list of qualified electors.

"Section 3035 of the Code of Alabama provides that the Tax Collector must file on or before the 15th day of March in the office of the Probate Judge an alphabetical list containing names of all persons in the County who have on or before the First day of February of the current year paid poll tax.

"Many persons whose names are on the list of qualified voters as published in the year 1936 did not pay their poll tax on or before the first day of February, 1937. Many other persons, whose names are not on the aforementioned list of 1936, have paid poll tax and registered so as to become qualified electors.

"In the event the Tax Collector should not file the list of persons having paid poll tax for the current year as required by Section 3033 until after March 10, and before March 15, what would be the correct list of qualified voters or electors of Butler County? In other words, could the 1936 list of qualified electors be considered the correct list to be delivered to the election officials even though said list should have thereon the names of persons who had not paid their poll tax for the current year and might not have thereon the names of persons who have subsequently paid their poll tax so as to qualify themselves as electors.

"If you should determine that I should obtain from the Tax Collector the list of those persons who have paid their poll tax on or before February 1 of the current year so as to make a corrected list of qualified electors, is there any compensation provided by law for the making up of the new list and for the publication thereof?"

In answer to your first inquiry, I am of the opinion that, even though the Tax Collector has not certified to you before March 10, 1937, a list of those persons who have paid poll tax for the current year, that it is incumbent upon you to obtain from the office of the Tax Collector the names of those persons who have paid their poll tax for the current year in order that you may correctly comply with the requirements of Section 388 of the Code of Alabama 1923. This conclusion is based upon an opinion rendered by me on February 4, 1935, to Hon. Charles E. McCall, State Auditor, a copy of which opinion is hereto attached.

In answer to your second inquiry, I wish to advise that you as Probate Judge may employ such clerical assistants for the preparation of such list as may be necessary, the same to be paid as provided by Act No. 251, Acts 1931, page 293.

The list here under consideration is the list required to be delivered to the election inspectors immediately preceding the election and is not the biennial list that is published under the provisions of Section 387.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 23, 1937.

Hon. S. J. Gray,
Board of Registrars,
Mobile County,
Mobile, Alabama.

Elections—One convicted of a felony in Federal Court before becoming naturalized must nevertheless have civil and political rights restored by Governor of Alabama before being entitled to register after becoming naturalized.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 22, 1937, which is as follows:

"We have an applicant for registration who recently became a naturalized citizen of the United States. Prior to the time he received his naturalization papers he was convicted in the Federal Court of violating the prohibition laws, receiving a sentence of a year and a day and served his time. He contends that since he was not a citizen at the time of his conviction it is not necessary that his civil rights be restored by the Governor of Alabama. Please let us have your opinion as to whether or not it will be necessary for his civil rights to be restored by the Governor of Alabama before he can be accepted as a qualified elector."

I am of the opinion that your inquiry should be answered in the affirmative.

This office has heretofore ruled that one who has been convicted of a felony in the Federal Court must have his civil and political rights restored by the Governor of this State before being authorized to vote.—**Biennial Report of Attorney General, 1930-32, pp. 742; Quarterly Report of Attorney General, Vol. II, pp. 235. 252.**

The question then presents itself as to whether or not this rule would apply to one who was convicted of a felony in the Federal Court before he became a naturalized citizen. In my judgment it does. The disqualification provisions of the Constitution of 1901, (Section 182), and of the Code of 1923, (Section 364) both refer to persons rather than citizens. The word "persons" is used in each instance and no reference whatsoever is made to citizenship or inhabitance. This being true it follows that it is immaterial as to whether or not the person so convicted is an alien or a naturalized citizen.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 23, 1937.

Honorable Charles W. Lee,
State Comptroller,
Capitol.

Education—County Boards of Education or City Boards of Education authorized to use matriculation fees in paying secretarial salary, school equipment and supplies.

School trustees are not authorized to use incidental fees collected from pupils to pay for school equipment, supplies and secretarial salary.

Manner in which Jean Fund may be used by Board of Education is not regulated by laws of Alabama, but may be used according to the terms of the trust agreement.

County Board of Education may in some instances employ an attorney.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry which is quoted as follows:

"The Examiners of Accounts have found that the County Board of Education in certain counties is using the Incidental Fees to pay for the following items, to-wit;

"(1) Salary of Secretary to the High School Principal.

(2) Purchase of Band Instruments.

(3) Purchase of Sound Equipment for use in a pageant.

"4. Purchase of Flowers for use in a pageant.

(5) Purchase of a Frigidaire.

(6) Purchase of Lumber, Nails, Paint, etc. for use in Manual Training Department.

(7) Purchase of Thread, Cloth, Patterns, Groceries etc. for use in Home Economics Department.

"1. Has the Board of Education, Board of Trustees or High School Principal authority to use the Incidental Fees in paying for the above mentioned items? Refer to opinion of Attorney General, page 206, 1926-28 report.

"II. Has the Board of Education, Board of Trustees or High School Principal authority to pay the expenses of a worker, that is employed under the law, known as the Jean Fund, while said Worker is attending Summer School?

"III. Has the County Board of Education authority to pay an Attorney a fee for rendering an opinion to said Board, where the Attorney draws a regular salary from the Board as an employee?"

It is my opinion that the County Board of Education or the City Board of Education, as the case may be, has authority to use matriculation fees to pay for items 1 to 7, inclusive, mentioned in your letter, but

it is further my opinion that school trustees who have collected incidental fees pursuant to authority set forth in Sec. 182, (now repealed) Alabama School Code, 1927, have no authority to use the incidental fees to pay for items 1 to 7, inclusive, or any of them.

The right to purchase or pay for the items mentioned in your letter depends upon whether legislative authority has been given for that purpose. If legislative authority has been given then it must be within the constitutional limits. The constitutional right of the Legislature was decided favorably in the case of Vincent vs. County Board of Education of Talladega County, 131 Southern Reporter, page 293 in which the court held that Section 467, Alabama School Code, 1927, was constitutional. I quote Section 467 as follows:

> "467. A matriculation fee may be collected for each semester from all pupils in accredited high schools, including County High Schools, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be, and the proceeds of such fees shall be expended under the direction of the County Board of Education or the City Board of Education as the case may be. A reasonable fee for library, laboratory and shop work may be required, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be."

The first sentence of this section authorizes the school authorities therein named to collect a matriculation fee for each semester for all pupils in accredited high schools, and provides that the proceeds of said collection shall be expended under the direction of the County Board of Education or the City Board of Education as the case may be. There is no restriction as to how and for what purposes these funds may be spent. The second and concluding sentence of Sec. 467 authorizes the imposition of an additional fee for library, laboratory and shop work, the amount to be determined by the County Board of Education or the City Board of Education as the case may be.

Your request does not state whether the items purchased were for use in an accredited high school or to be used in a grade school. The last three items mentioned in your letter evidently were used in a high school as a grade school would probably have no use for such items. Hence, Sec. 467, supra, contains no restrictions as to how and for what purpose matriculation fees may be used, but leaves the matter entirely in the hands of the school authorities therein named, and I can see no reason why the items mentioned in your letter were not lawful purchases out of the matriculation funds.

Such items could not be lawfully purchased with incidental funds collected from pupils as authorized by Sec. 182, supra, which I quote as follows:

> "182. The Board of School Trustees shall have the power with the approval of the County Board of Education to fix and collect a reasonable incidental fee to be paid by each pupil entering the school. Monies received from such fees shall constitute an incidental fund subject to use for repairs, improvement of grounds, insurance and other incidental expenses. The principal teacher of said school shall be the custo-

dian of the incidental fund, shall keep an accurate account of the same, and pay the same out on the order of the Board of Trustees. Such custodian shall make report to the County Board of Education at least once each year of receipts and disbursements, and whenever requested by said Board to do so."

The use of the fund so collected under the foregoing section is restricted by express provisions of the law. Funds must be used for purposes incidental to the operation of the school. They may be used to make repairs on the school building, to improve the grounds, to pay insurance and for other incidental expenses. Reference is made to an opinion of Mr. Chas. C. McCall, Attorney General, to Hon. E. L. Hays, reported in Biennial Report 1926-28, page 206, 207.

I invite your attention to an act of the Legislature, General Acts of 1935, page 1092, the effect of which is to repeal section 182, supra, by specific reference. Since said Act was approved by the Governor, it has not been lawful to charge incidental fees as previously authorized by Sec. 182. Therefore, no question as to the use of incidental fees collected since the repeal of Sec. 182 can arise.

I am informed by the State Department of Education that the Jean Fund is a philanthropic donation deposited with the State Board of Education under a trust agreement as to how the money may be used. Violation of the trust agreement by the State Department of Education might work a forfeiture of the Trust Fund, but it would not violate any statutory law in Alabama. It is my information that the trust fund was set up to provide training for special negro teachers who are selected by the State Department of Education, and that being true, the expenses of a negro teacher or worker while attending summer school could be paid.

With reference to your third question, I am not able to give you an answer for the reason that you do not give sufficient facts for me to form an accurate opinion. There are some instances when the County Board might be lawfully authorized to pay the attorney an additional amount for his services. If an attorney were employed by the School Board at a stipulated fee or salary and for that remuneration the attorney obligated himself to advise the School Board, then he would not be compelled to do any work for the School Board which was not within the terms of his contract. For instance, if an attorney were given a retainer's fee of $50.00 for one year as payment for advice, the attorney would not, under the contract, have to prepare all the proceedings necesary to issue anticipation-warrants or to prepare other proceedings which the Board might want him to do. The mere fact that the attorney is paid a retainer fee or draws a salary from the Board of Education would not necessarily exclude payment to him of another fee. The attorney would be expected to carry out his contract and he could not lawfully be paid an extra fee for performing services which he obligated himself to perform under the terms of the contract with his employers.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Hon. Lloyd Woodruff.
Superintendent of Butler County Schools,
Greenville, Alabama.

Court of Commissioners - Act No. 602, Acts of 1931, page 687 authorized the Butler County Court of Commissioners to make an appropriation for report cards used in public schools of Butler County.

Opinion by Assistant Attorney General Simmons.

My dear Sir:

Reference is made to your inquiry in which you ask my opinion if the Commisioners Court of Butler County may lawfully pay for report cards which have been bought by the County Superintendent of Education for the use of children in the public schools of Butler County.

It is my opinion that the Commissioners Court of your County has such authority vested in them by Act. No. 602, General Acts of Alabama, 1931, page 687, provided they make an appropriation therefor in accordance with this section which reads as follows:

"The Courts of County Commissioners or Boards of Revenue of the several counties of Alabama are hereby authorized at any meeting of said court in any calendar year to appropriate any part they may deem proper and expedient out of the general funds of the treasury for the support of the public schools in said County."

This statute is authority for such purchase.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Hon. R. E. Adams,
Probate Judge
Escambia County
Brewton, Alabama

Act No. 462, General Acts for 1935, page 990, does not prohibit County Commissioners of Escambia County from paying claims for telephone designated under Act No. 187, General Acts for 1933, page 201.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter in which you submit an inquiry as follows:

"Please refer to Act No. 462 on page 990 of the General Acts of the Legislature of 1935 and let me have your official opinion as to whether this act prohibits the Courts of County Commissioners from paying the claims for telephones and telephone services for County Offices not included in this Act, or if this act merely changes the

order of priority of payment of telephome bills for the offices mentioned in this Act."

Act No. 187, General Acts of 1933, page 201, authorizes the Board of Revenue or Court of County Commissioners to designate which offices in the Court House may have telephones installed therein.

The authority granted by this Act carries with it authority on the part of the County Commissioners to pay for such telephones as they designate pursuant to the terms of the foregoing Act. I refer you to an opinion of this office dated January 22, 1936, to Hon. Cecil H. Strawbridge of Vernon, Alabama, Quarterly report of the Attorney General, Vol. II, page 54.

Act No. 462, General Acts of the Legislature of 1935, page 990 fixes and establishes priority of payment of claims for telephones installed in the offices of the officials designated in the Act, but does not, in my judgment, repeal, alter or modify the authority granted to the Boards of Revenue or Courts of County Commissioners by Act No. 187, supra. to designate which offices in the Court House may have telephones installed therein. It is my opinion that the County Commissioners of your County may designate which offices in the Court House may have telephones.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Brigadier General John C. Coleman,
The Adjutant General,
The Capitol,
Montgomery, Alabama.

Taxation—Gasoline Excise Tax—Gasoline purchased by the State Armory Commission, an agency of the State of Alabama, not subject to Federal, County or City Excise Tax levied upon gasoline sales or storage.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Opinion is requested as to whether gasoline used in the construction of armories which are Federal Sponsored buildings are exempt from Federal, County and city taxes on gasoline.

"The Works Progress Administration, which is a Government body created to give employment to the unemployed, has allocated to the State of Alabama several hundred thousand dollars for the purpose of building armories in this State.

"The Armory Commission of Alabama, a corporation created by an Act of the Legislature for the purpose of building or constructing armories in the State, has agreed with the Works Progress Administra-

tion to do certain things provided that it would allocate money for the purpose of constructing armories. At this time we have under construction in the State of Alabama armories at Athens, Decatur, Huntsville, Guntersville, Jacksonville, Troy, Tuscaloosa and several other places, to be exact twenty-six (26) armories, and the Armory Commission of Alabama has agreed to haul rock, brick and lumber and other things needed in the construction of armories, provided that the Works Progress Administration would furnish money to buy the materials for the construction of said armories. The Works Progress Administration has agreed to quarry rock, furnish brick, etc., for the construction of these armories and the State Armory Commission has agreed to furnish trucks, gasoline and oil for the transporting of rock from the quarries and brick and lime from the kiln, provided, that the Works Progress Administration would furnish labor in hauling these articles above mentioned.

"These buildings as stated above are State owned buildings, constructed by the Government for the purpose of housing the National Guard of Alabama which is Federally recognized by the Government."

As I understand the facts stated in your request, the gasoline necessary for the operation of the trucks in hauling materials and supplies in the building of the armories with WPA labor, is purchased by, and paid for from funds belonging to the Armory Commission of Alabama, an agency of the State.

Under such circumstances, it is my opinion that, under the inherent limitations upon one sovereignty levying a tax upon the other, gasoline so used, or the sale or storage thereof cannot be taxed by the Federal Government.

In so far as taxes are levied by the counties and cities upon the sales or storage of gasoline, as to the converse situation, it is a general principle of law that, unless the contrary specifically appears, it is not to be presumed that the State intends its levies of taxes to apply to counties and cities. State vs. Montgomery, 228 Ala. 93, Compare Quarterly Report of the Attoney General Vol. II, page 253—Birmingham vs. State, 170 So. 64, Jefferson County vs. State, 170 So. 70.

But cities and counties possess and can exercise only those powers granted by the Legislature in express words, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation—Alabama Digest, Vol. 5, Title "Counties" Key No. 1, Alabama Digest,—Vol. 15, Title "Municipal Corporation," Key No. 57—and the cases there cited.

No express or implied authority has been conferred upon cities and counties to levy taxes upon instrumentalities of the State.

It is therefore my opinion that city and county taxes levied upon the sale or storage of gasoline can not apply to such gasoline as is inquired about in your request for opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Hon. T. B. Pearson,
County Superintendent of Education,
Washington County,
Chatom, Alabama.

Schools—Bond of County Superintendent of Education now payable out of School Funds. Statement of receipts and disbursements and annual report of County Board of Education paid out of School Funds. If these expenditures are paid by county governing body refund may be made by County Board of Education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 23, 1936, which is as follows:

"In checking the records of the Court of County Commissioners, Washington County, Mr. Grubbs, Assistant Examiner of Accounts, charged to the Probate Judge of Washington County the amount of thirty-six dollars ($36.00) for payments on the bond of the County Superintendent of Education. Since the passage of the Bains Act these bond premiums should have been paid by the County Board of Education. The Probate Judge of this county has presented us with a bill for the said $36.00, and requests payment of same from the County Board of Education. Kindly advise if this would be a legal expenditure of county school funds. Should we pay this account to the Probate Judge for General Fund of Washington County.

"In like manner a charge of one hundred eighty-nine dollars ($189.00) was charged to the Probate Judge for payment to the local newspaper for publishing the annual report of the County Superintendent. Kindly advise if we may legally pay to the Probate Judge this amount from the school funds of Washington County."

I am of the opinion that both of your inquiries should be answered in the affirmative.

Under Section 20 of Act No. 191, H. 344, approved April 20, 1933, (General Acts 1933, p. 203), the premium on the bonds of County Superintendents of Education and County Treasurers of School Funds (now Custodians of County School Funds) shall be paid by the County Board of Education out of the three mill school tax. This Act changed the law heretofore in existence that said premiums were paid by the county governing body.

In an opinion of this office found in Biennial Report of Attorney General, 1930-1932, p. 110, it was held that the expense of printing the statements of receipts and disbursements and of the annual report required by Section 123 of the School Code of 1927, must be paid out of the educational fund of the county by the County Board of Education and not by the Board of Revenue or Court of County Commissioners.

If the above payments were made by the county governing body instead of by the County Board of Education, refund should be made to said county governing body by the County Board of Education. Therefore in

my opinion you may legally pay out of school funds the refund due the General Fund of Washington county.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 24, 1937.

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Constitutionality—Act No. 139, H. 393, approved April 21, 1936, (Local Acts 1936, p. 88), is unconstitutional and void as being violative of Section 106 of the Constitution of 1901.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 12, 1937, in which you request my opinion as to the constitutionality of Act No. 139, H. 393, approved April 21, 1936, (General Acts 1936, p. 88), in view of the fact that notice was published only for three consecutive weeks.

In answer to your inquiry, I am of the opinion that the Act in question is unconstitutional and void as being violative of Section 106 of the Constitution of 1901.

Section 106, supra, provides that notice of intention to apply for the passage of a Local Act must be published at least once a week for four consecutive weeks. House Journal of 1936, p. 709, affirmatively shows, by affidavit of publisher, that said notice was published for "three consecutive weeks: February 5, 1936, February 12, 1936, and February 19, 1936, inclusive. This is not in compliance with Section 106, supra, and, therefore, the Act must fall.

The provisions of Section 106 are mandatory and the Journal must affirmatively show that the prescribed notice was given—**Larkin v. Simmons,** 155 Ala. 273, 46 So. 451; **Longshore v. State** 200 Ala. 267, 76 So. 33.

An opinion of this office rendered to the Circuit Clerk of DeKalb County on February 5, 1937, relative to the local Act in question did not deal with the constitutionality thereof. However, said opinion hereby overruled in view of the fact that the Local Act that said opinion construed is unconstitutional and void.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1937.

Hon. Geo. E. Stone,
County Treasurer,
Mobile County,
Mobile, Alabama.

Mobile County—Bond of County Treasurer is fixed by Acts of 1880-1881, page 498, but additional bond may be required by County governing body under Section 16, Acts 1933, page 203.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The Office of County Treasurer of Mobile County was begun in 1881, (Acts of 1880-81, page 498). In this Act the salary was fixed at $2500.00, and the bond at not exceeding $30,000.00. This Act has never been directly repealed. The Constitution of 1901 did not repeal it.

"By the Acts of 1915, page 348, the office of County Treasurer was abolished in all counties of not more than 55,000 population. This did not affect Mobile County.

"By the Local Acts of 1907 page 727 et seq., Section 8, additional duties were imposed on the Treasurer, and additional compensation of not less than $600.00 per year was added.

"By an Act, approved September 25, 1919 (Acts 1919 page 562) the salary of County Treasurers in all counties in the State having more than 80,000 population and less than 150,000 population, was fixed at $4000.00; and all laws or parts of laws in conflict, including local laws, were repealed. There was no charge as to the bond.

"By the Acts of 1927 page 29, the salary of all County Treasurers in Counties having over 90,000 population and less than 180,000, was fixed at $6000.00. There was no change as to the bond.

"By the Acts of the Special Session Acts 133, page 138, the salary of all County Treasurers in all Counties from 90,000 to 180,000 population, was fixed at $4800.00. There was no change as to the bond.

"Under the Acts of 1936 page 101-103, the County Treasurers who are elected under the general law have to give a bond, not to exceed $100,000.00; but this act provides that it does not repeal nor modify any local act covering or providing for any of the provisions of this act.

"In view of these facts, do I give the bond as provided by the local law of 1880-1881, or by the provisions or this last enactment?"

In my opinion, the bond which will be required of you, as County Treasurer, is that fixed by the Local Acts of 1880-1881, referred to in your request.

This local act has not been repealed by the subsequent general acts broadly regulating the subject, (Acts 1933, page 203, as amended by Acts

1936, page 101) for the reason that the latter purports to deal with only those County Treasurers and depositories or persons acting as treasurers in lieu thereof, dealt with in Chapter 17 of the Code of 1923; and therefore there is no conflict between the two. Furthermore, the 1936 amendment, supra, specifically provides, by Section 3, that no local act relating to the subject therein dealt with, shall be modified or repealed by its enactment. Compare Quarterly Report of the Attorney General Vol. II, page 159. See also Quarterly Report, Vol. IV, page 36.

However in my opinion, Section 16 of Acts 1933, page 203 is applicable and the county governing body of Mobile County may require additional bond, as is therein provided.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1937.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Gin Company engaged incidentally in buying cotton not liable for license imposed on parties whose "principal business" is buying cotton.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 18, 1937, in which you request my opinion as follows:

"I call your attention to schedule 43 of Section 348 of the Revenue Laws of 1935, Acts of 1935, page 456.

"Ware-Darby Gin Company of this city is engaged in operating public gins in this and Lauderdale counties. In connection with these gins, they buy cotton. Buying cotton is not, I am reliably informed, their principal business.

"Should they be required to take out cotton buyers license?"

In my opinion, the Ware-Darby Gin Company mentioned in your letter would not be liable for the license imposed by Schedule 43 of the Revenue Laws of 1935 upon persons whose principal business is buying cotton, inasmuch as you state in your letter buying cotton is not the principal business of this firm.

Schedule 43, supra, provides as follows:

"Each person whose principal business is buying cotton, shall pay one state license of Twenty-five Dollars ($25.00), and shall also pay a license of Ten Dollars ($10.00), in each county in which such person shall maintain an office or buy cotton."

In the case of Equitable Building and Loan Association v. State; 168 So. 695, it was held that "Principal Business" as found in Schedule 70, Section 361, General Acts 1919, pp. 395, 419, is a "mere matter of Classification and nothing more." However, I do not believe that this definition is applicable when applied to the facts in the instant case. It appears to me that the word "principal" must be given its commonly understood meaning, i. e. "main; leading; outstanding; important" (Webster's New International Dictionary, Second Edition). Adopting this definition it is clear that the Gin Company mentioned in your inquiry is not liable for the license imposed by Schedule 43.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1937.

Mr. Dan Kinney,
Member, Board of Finance and Control,
Cullman County,
Cullman, Alabama.

Local Act No. 126, Acts of 1936, page 70—Cullman County. Compensation of Board members limited to $5.00 a day, but not to exceed $75.00 a month for both general and special sessions.

Opinion by Assistant Attorney General Simmons.

My dear Sir:

I acknowledge an inquiry which was signed by you, Mr. Shoemaker, Mr. Keaton and Mr. Ance, as follows:

"We would appreciate your advice in regard to the construction of Local Bill relating to Cullman County. Local Act of Alabama Extra Session 1936, pages 70-75. Section 15 of this Act, page 72 provides as follows:

"The Chairman of the said Board of Finance and Control shall receive a compensation of $150.00 monthly; and each of the associate members shall receive $5.00 per day for each day's service, not in excess of $75.00 in each month, remaining in session as many days as may be necessary, and may hold special meetings at the call of the chairman. * * *'

"Also Section 17 of this local act provides as follows:

" 'The Board of Finance and Control shall hold regular meetings on the first Monday in each month and may hold special meetings at any time on the call of the Chairman of the Board, or of three members entering into writing on the minutes of the Board.'

"This Board would appreciate being advised if after they have met fifteen days and drawn the $75.00 in one month, and then find it necessary to hold a special meeting under Section 17 of this Act, can they draw the $5.00 per day for each day served at such special meeting."

It is my opinion that the associate members of the Board of Finance and Control of your County are not lawfully authorized under the Local Act to draw per diem compensation in excess of $5.00 a day and it is further my opinion that each member of the Board is not lawfully authorized to draw a total compensation in excess of $75.00 for each month. The total shall include general and special sessions.

Section 15 of the Act, page 72, reads that each associate member shall receive $5.00 per day for each day's service, and it is my conclusion that the word "each day" includes the time consumed in a general or special session, either or both, and that no compensation in excess of $75.00 during any one month may lawfully be paid, and that, irrespective of the kind of session held.

I pretermit any question as to the constitutionality of this Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1937.

Hon. Edward J. Huet,
Clerk, Inferior Criminal Court,
Mobile County
Mobile, Alabama

Mobile County—Inferior Criminal Court Clerk not entitled to commission for the collection and remittance of fines, penalties and forfeitures.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of recent date in which you ask if you are "entitled to a commission for the collection and remittance to the State of fines, penalties and forfeitures."

It is my opinion that you are not entitled to any commissions for such collections and remittances. The local act, approved February 23, 1899, as amended by Act No. 396, Local Acts of 1927, page 329, details the duties to be performed by the Clerk of the Inferior Criminal Court of Mobile County, and further provides:

"It shall be the duty of said Clerk to assess and collect in each criminal case all the costs, fines and fees provided for under the laws of Alabama for Justice of the Peace, and said moneys so collected shall by him be paid into the treasury of Mobile County."

This Act as amended also provides as follows:

"For all the services rendered in the said Court, said Clerk shall receive an annual salary of $2400.00 payable monthly from the County Treasury of Mobile County, and shall receive no fees whatever."

The words "all the services," of course, include the collection and remittances of fines and forfeitures and costs. The salary provided for in the Act is, in my judgement, in lieu of all fees and commissions provided by law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1937.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Motor Vehicles—License Tags—Party possessed of automobile prior to November 15th not entitled to purchase license on monthly declining basis as provided in Schedule 158.1 of the Revenue Laws of 1935, as amended.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 18, 1937, in which you request my opinion as follows:

"I have before me the new law under Schedule 158, in reference to 'New and Used Cars Buy Licenses on a Monthly Declining Basis'. The law reads, 'Provided, however, that for new and used automobiles acquired subsequent to November 15 in any tax year, the licenses shall be purchased on a monthly declining basis of one-twelfth for for each month of the tax year, and the purchaser shall only buy a license for the then remaining months of the tax year.' Now the question involved is this, the use of the word 'acquired' before November 15. 'A' purchases a car, and buys a license to operate that car to September 30, 1937. At this time he determines that he is unable to operate his car, and he stores it. Then, in March, he determines that he is in better shape, and presents himself to the Probate Office for the purchase of an automobile tag. Does 'A' buy a 7 months tag or is he required to buy a 12 months tag?"

In my opinion, the party mentioned in your inquiry who purchased the automobile before November 15th but who does not operate same until the following March would not be entitled to purchase a license on a monthly declining basis. Schedule 158.1 as amended by Act No. 67 H. 21 approved February 9, 1937, provides, as pertinent, as follows:

"Provided, however, that for new and used automobiles acquired subsequent to November 15th in any tax year these licenses shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year and that the purchaser shall only buy a license for the remaining months of the tax year."

The word "acquired" as used in the above quoted section must, in my opinion, be given its commonly understood meaning. i. e: "gain by

any means, usually one's own exertions; to get as one's own" (Webster's New International Dictionary). Thus, it appears that where a party is possessed of an automobile on or prior to November 15th, regardless of whether same is being operated or not, this automobile is not "acquired" after November 15th so as to permit the purchase of a part year license.

In further support of the above conclusion, I direct your attention to the fact that the authors of the amendment to Schedule 158.1 have included in the provision concerning motor cycles the words "or is **not used** prior to ", as follows:

> "Where the motor cycle is acquired or brought into the State on or after January 1st, **or is not used** prior to January 1st, the license shall be $3.00. Where the motor cycle is acquired or brought into the State after April 1st, **or is not used** prior to April 1st, the license shall be $2.50. Where the motor cycle is acquired or brought into the State after July 1st, **or is not used** prior to July 1st, the license shall be $2.00."

The omission of these words from the proviso dealing with new and used automobiles is clearly indicative of a legislative intent that only those automobiles which were "acquired," as hereinabove defined, subsequent to November 15th shall be entitled to part year licenses.

Of course, however, the party would be entitled to a half year license, as provided by Schedule 158.13, if the car were not operated until after March 31st. This Schedule is in part as follows:

> "158.13. (a) One-half of the license herein provided for shall be paid plus One Dollar ($1.00) where the motor vehicle is acquired or brought into the State on or after April 1st of any year, or is not used or operated between the period from October first through March thirty-first following the payment of the registration fee or license tax * * *."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 1, 1937.

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama

County School Board operating under General Laws of the State has authority to elect a County Superintendent of Education for a period of four years, and at the time of such election to fix a reasonable expense allowance as a part of the compensation of such Superintendent of Education; but the County Board of Education is not authorized, in the midst of the term of such County Superintendent of Education, to grant an expense allowance.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 16, 1936, which is as follows:

"Please advise me on the following situtation: The Board of Education of Cullman County appointed Mr. R. E. Moore as county superintendent of education for a term of four years, beginning July 1, 1933. The Board fixed his salary at a stated sum, but allowed no travel expense account for the reason that it was the view of the Board that at that time such an allowance was considered illegal.

"When the Attorney General in an opinion dated August 19, 1935, held that county boards of education have authority under the general law to fix, in their discretion, the contract of employment of the county superintendent of education and have authority to provide expense accounts, the Board of Education of Cullman County by resolution voted Superintendent Moore an expense allowance effective July 1, 1935.

"Please advise me whether the Board of Education was within its legal rights in voting the above mentioned travel expense."

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office rendered to the State Comptroller on August 19, 1935, to which you refer, it was held that under the general law County Boards of Education have authority to fix the salary of County Superintendents of Education, together with an expense account, as part of the contract of employment. The expense account referred to in said opinion was fixed at the time the salary was fixed. In other words, the total amount of the compensation was fixed at the begining of the term of office of the County Superintendent of Education. Said holding was not in conflict with the case of Woodruff v. Beeland, 220 Ala. 652, 127 So. 235. The said case dealt with a Local Act. It held that under the wording of the local act, there was no authority for the County Board of Education to allow the County Superintendents of Education the expense allowance involved in that case. The court in said case pretermitted a consideration of the question of whether or not an expense allowance could be considered as part of the salary which the County Board had authority to fix; neither did the court discuss the authority of Boards of Education in Counties where the boards elect and fix the compensation of Superintendents of Education. The opinion of this office above referred to was based on the theory that the salary and expense allowance, which were fixed at one and the same time, are considered as a total compensation.

In the instant case the additional expense allowance was fixed after the County Superintendent began his term of office with a fixed salary. If it be considered as part of his compensation, such would amount to increase in the compensation of the County Superintendent during the term for which he was appointed or elected in violation of Section 281 of the Constitution of 1901.—**McMurry v. Franklin County Board of Education,** 216 Ala. 144, 112 So. 644.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1937.

Mrs. Annie P. Hardenbergh,
Probate Clerk, Hale County,
Greensboro, Alabama.

Probate Judge—When vacancy exists duties of Probate Judge are performed by Chief Clerk pursuant to Sec. 9594, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

My dear Madam:

Reference is made to your inquiry as to who performs the duties of the Judge of Probate in case of his death and seeking information as to how funds deposited to the credit of the Probate Judge are to be handled, who makes the reports, how are remittances to be made, and who signs the county warrants.

I refer you to Sections 9592 and 9594, both of which I quote as follows:

"9592. AUTHORITY OF CHIEF CLERK. — The chief clerk has the following powers—

"1. To issue letters testamentary, of administration, and of guardianship, where there is no contest.

"2. To administer oaths relating to the business of the court, and take and certify acknowledgements and proof of instruments authorized to be recorded.

"3. To solemnize matrimony, approve bonds, and appoint guardians ad litem.

"4. To admit will to probate and record, and to pass and allow accounts of executors, administrators and guardians, where there is no contest.

"5. To do all other acts and things and perform all other duties, ministerial and judicial, where there is no contest, that the judge of probate could do and perform, except to hear and grant writs of habeas corpus and writs of certiorari. All of the official acts of such chief clerk must be performed in the name of the judge of probate except when there is a vacancy in that office."

" 9594. (5432) (3374) CHIEF CLERK CONTINUES TO PERFORM DUTIES OF OFFICE PENDING VACANCY, Etc.—Whenever a vacancy shall occur in the office of the judge of probate, the chief clerk in that office, appointed and qualified as authorized by law, shall, during such vacancy and until the qualification of a lawful successor, perform all the duties of that office which he is authorized by law to perform where there is no vacancy, but must not receive money on decrees or executions, or become the custodian of trust funds pertaining to the court. He may make all necessary orders for the continuances of causes and proceedings pending in the court. All such duties are to be performed, during such vacancy, by such chief clerk in his own name as clerk of the probate court, and he is entitled to the lawful fees therefor. For his official acts hereunder, such chief clerk and the

sureties on his bond to the judge of probate, shall be liable to persons injured, according to the legal effect of official bonds as declared by statute. If such chief clerk shall fail or refuse on demand to deliver all the books, papers, property, and money belonging or appertaining to such office, to the lawfully qualified successor of the judge of probate, he may be proceeded against under the provisions of this Code to compel the delivery of books, papers, property, and money by public officers to successors."

You will observe that Section 9594, supra, authorizes the chief clerk of the probate court, in case of a vacancy, to perform all the duties which he is authorized by law to perform when there is no vacancy, such duties being authorized by Section 9592, Code of Alabama, 1923, but the chief clerk must not receive money on decrees or executions, or become the custodian of trust funds pertaining to the court. His duties are to be performed in the name of the chief clerk.

With reference to the request for specific information contained in your inquiry, it is my opinion that the chief clerk in his or her own name, is authorized to remit money which has been deposited to the credit of the probate judge, is given the right to make reports which was a duty of the probate judge to make, and, except in cases of contest, to perform duties, ministerial and judicial, which the probate judge could do and perform, except to hear and grant writs of habeas corpus and writs of certiorari. The chief clerk has been given a wide latitude in carrying on and performing the work of the probate judge, and in my judgment, he is authorized to sign warrants.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1937.

Hon. J. L. Kaufman, Chairman,
Unemployment Compensation Commission,
Montgomery, Alabama.

Rules and regulations adopted by State Unemployment Commission under Section 10, Subsection (b) of the Unemployment Compensation Law of Alabama (at page 961, 1935 Acts of Legislature).

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of November 5, 1936, in which you request my opinion as to whether the definition of "Agricultural Labor" as set forth in the rules and regulations adopted by the Unemployment Compensation Commission shall prevail or whether same should be changed in accordance with the provisions of House Bill 58 of 1936 Extraordinary Session, approved April 9, 1936.

I assume that the definition adopted by the Commission was under and by virtue of the authority conferred in Section 10, Subsection (b) of the Unemployment Compensation Law of Alabama (at page 961, 1935 Acts of Legislature). If this is correct, then I am of the opinion that the

definiton should be made to conform to the provisions of House Bill 58, supra. The making of rules and regulations is the duty of the Legislature, and while it may delegate this duty to a Commission, within a limited scope, any rule or regulation made by a Commission must conform to the Acts of the Legislature.

As the rule adopted by the Commission is in conflict with this subsequent enactment of the Legislature, I am of the opinion that the Act should prevail.

For authorities in reference to delegation of powers by the Legislature under circumstances detailed by you, I refer you to an opinion addressed to Hon. Gaston Scott, President State Highway Commission, Montgomery, Alabama, dated January 31, 1936, Quarterly Report of Attorney General, Volume II, page 89.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1937.

Hon. T. M. Smith,
Member, Board of Revenue,
Prattville, Alabama.

Autauga County—Local Acts of 1878-9, page 248. County Commissioners should charge the cost of highway construction in the County to the County as a whole and not to the District in which the highway work is done.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of October 9, 1936, which has not had my attention due to the large amount of work which has flooded this office during recent weeks. I quote your letter as follows:

"I am a member of the Board of Revenue of Autauga county representing District One. Work is being started on the new Montgomery-Tuscaloosa highway through this county and Judge J. F. Posey is of the opinion that rights-of-way should be paid for by the districts through which the highway runs, while I am of the opinion that the county as a whole will be benefited by the new highway and therefore all expense incidental to the construction of the highway should be borne by the county as a whole. I might also tell you that this road is being built as a Works Progress Administration project with the county, state and federal government participating.

"For your further information I might add that Autauga County operates under acts of 1878-79, page 248, amended 1896-97, page 1162. There have been other amendments since that time so I have been told.

"The Board of Revenue meets next Tuesday and I would greatly appreciate an opinion from you before that time if possible so that I may know just where I stand in this matter."

It is my opinion that the cost of constructing highways in your district or in any other district of your county should be charged to the whole county and not to the district in which the highway work is done.

I have examined the Local Act of 1878-79, page 248. which establishes the governing body of your county and I can find no provision therein which requires highway construction work done in one district to be charged to that district. This Act was amended in a Local Act which appears on page 1162 of the Local Acts of 1896-97, but this amended Act was repealed by Local Act appearing on page 556 of the Local Acts of 1898-99. The repeal became effective on approval by the Governor on February 3, 1899. In the absence of a local restriction, the general laws of Alabama with reference to allocation of the cost of highway construction in your county would apply.

It is, therefore, my opinion that the governing body of your County has no authority to charge to your district alone the cost of highway construction therein.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Courts of County Commissioners—Per diem and mileage of members—General resolution or order of Commissioners Court authorizing named members to inspect roads and bridges in specified districts in the county for a specified period is sufficient compliance with 6771 of the Code of Alabama of 1923 as amended to qualify members acting thereunder for per diem and mileage.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"The members of a certain Commissioners Court have been drawing various amounts for inspecting roads and bridges out of the Gasoline Fund of the County, a copy of such claim is as follows:

22 days at $3.00	$ 66.00
900 miles at 5 cents	45.00
	$111.00

Sworn to and subscribed before me. (Date)

(Signed) .....

"The authority for filing this claim and doing this inspection work is set out in the minutes of the court as follows:

"It is ordered, adjudged and decreed by the Court that _____ inspect roads and bridges in District No. _____, _____ County for the month of _____.

"This resolution is passed at each monthly meeting of the Court, with a few exceptions.

"1. Does the claim referred to above meet the requirements of law as to itemization, etc.?

"2. Does the above resolution meet the requirement of law as to the proper authority for inspecting roads and bridges?

"3. If your answer to either of above questions is in the negative would the Probate Judge and his Official Bond be liable for such expenditure?"

In my opinion, your first two questions should be answered in the affirmative, and this dispenses with the necessity of an answer to your third question.

Section 6771 of the Code of 1923 as amended by Acts 9131, page 805, generally provides for the compensation of members of Courts of County Commissioners and Boards of Revenue in the several counties of the State. After providing for the amount of per diem and mileage it fixes a limitation upon the members qualifying for pay for inspecting roads and bridges as follows:

"No allowance shall be made to any commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the commissioner's court, previously made."

This requirement of the statute is met in the situtation referred to in your letter. Compare Biennial Report of Attorney General, 1930-32, page 244 and opinions there cited.

But the per diem and mileage cannot be paid out of the Gasoline Tax funds in the absence of specific statutory authority therefor. In some of the counties local laws have been enacted authorizing payment of per diem and mileage of members of the county governing body, while engaged in supervision of the county roads and bridges, from the gasoline tax funds. But in counties governed by the general law, these claims must be paid from general funds of the county. Weaver vs. Tidwell, 228 Ala. 169.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4. 1937.

Hon. Roy O. Hill,
Clerk Circuit Court,
Dothan, Alabama.

Under Section 3667, Code of Alabama, 1923, which fixes the fees to be paid officers by the State on conviction and sentence to the peni-

tentiary or to hard labor, the fees as set out are to be paid unless especially limited by the section itself.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 6, 1937, in which you request my opinion as follows:

"The Board of Administration has requested me to get an opinion from you as to whether or not payments are due by them on a cost bill under the following state of facts:

"A was convicted, judgment entered against him, and sentenced to hard labor to work out a fine. Before A began serving his sentence, the Court set aside the judgment and sentence and reinstated the case for trial, on motion of A, on the grounds of testimony not avilable at the trial. When the case was later tried, A was again convicted, judgment entered against him and sentenced to work out the fine. Therefore, in making cost bill in this case, defendant was charged for two trials $1.00, two judgments .50, and two sentences .50. The Board of Administration has asked that I get a ruling from you as to whether it is liable for more than one trial, one judgment and one sentence.

"Please permit me to call your attention to the first item in Section 3667, wherein it is specified by the Legislature that a charge of 50c for writ of arrest be paid only ONCE by the Board of Administration, which would seem to indicate that, if it were the intention of the Legislature to pay other items only once, it would also be so specified."

I am of the opinion you are entitled to the fees enumerated in your request. These fees are set out in Section 3667, Code of Alabama, 1923, and where there is only one fee to be charged, as you suggest in your request, it says, "(once)", as for instance, "For issuing capias or warrant (once) 50c". I am of the opinion that if the Legislature intended that only one of any certain item be charged for only once, it would have said so as it did in the instance cited above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4. 1937.

Hon. G. E. Alday, Sheriff,
Washington County,
Chatom, Alabama.

Sheriff is not entitled to pay out of the fine and forfeiture fund for the county for serving witnesses to appear before the Grand Jury where no indictment is found.

Second—Sheriff would be entiteled to pay for serving witnesses to appear before the Grand Jury where there was an indictment and the

defendant later acquitted, State enters a nolle proseque or prosecution abated by death of defendant.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 20, 1937, in which you request my opinion as follows:

"Please furnish me with the following opinions:

"Would Sheriff be entitled to file claims against Fine and Forfeiture Fund for serving subpoena issued by Clerk for witness to appear before Grand Jury when no bill is found.

"Would service for serving subpoena for witness to appear before Grand Jury, where indictment is found and defendant against whom bill was found was discharged by court or case nol prossed by the court would this be a legal charge against Fine and Forfeiture Fund?"

My answer to your first inquiry is in the negative, based on an opinion of this office written July 3, 1935, Attorney General's Report, Office Edition, Book 5A, page 11. and also on **Kilgore v. Swindle,** 122 So. 333.

My answer to your second request is in the affirmative. That is, where the sheriff subpoenas witnesses before the Grand Jury which returns an indictment and on the trial in the Court the defendant is acquitted, the case is nol prossed or abated by death.

It is my opinion under these circumstances you would be entitled to your fee for serving witnesses to appear before the Grand Jury in such cases. **Kilgore v. Swindle** 122 So. 333.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1937

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Deed by executor conveying legal title to property to trustees to carry out will of testator is taxable.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter in which you enclose copy of an agreement and ask whether or not it is taxable. By the agreement the executor of the will of R. S. Munger, deceased, is placing certain property in trust with the Birmingham Trust and Savings Company for the purposes set forth in the will.

I am of the opinion that this instrument is taxable. The testator devised this property to the executor (Item 6 of will) and directed that the executor select a trustee with whom the property should be placed in trust. This instrument is a transfer to the trustee selected of the property therein specified.

In the opinion in the case of Hawkins vs. Pure Oil Company, 169 So. 307, the Supreme Court of Alabama mentions almost this identical situation in these words:

> "If, of course, the deed is for the purpose of acquiring the title, even though on a nominal consideration, the exception would not be applicable, as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator, and by which deed the legal title passes to the devisee."

It is my opinion, therefore, that the instrument which you enclose is taxable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 5, 1937

Hon. Minus H. Johnson,
Clerk, Circuit Court of Walker County.
Jasper, Alabama.

A witness appearing in a criminal case who resides out of the State of Alabama can only be paid mileage from State line.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 23, 1937, in which you request my opinion as follows:

> "We have a case in this County where the defendant is charged with murder, and the main State witness is in Steel, Mo., about three hundred miles from Jasper.
>
> "Will it be legal for me as Clerk of this County to issue him a witness certificate for this amount of mileage?
>
> "I would like to get a ruling from you at once as this case will be set in the latter part of March next."

This office has held that a witness out of the State appearing in a criminal case can only be paid mileage from the State line and cannot be paid beyond this. Biennial Report of Attorney General 1928-1930, page 763. We think the holding is correct and we affirm the same.

Friddle vs. Braun, 7 Ala. App. 429, 436.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 8, 1937

Hon. William G. Lindsey,
Attorney at Law
Chatom, Alabama.

The County is without authority of law to furnish County Solicitor with stationery for use of his office.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January, 18, 1937, in which you request my opinion as follows:

"Please give me your opinion as to whether the County should pay for the stationery used by the County Solicitor, who maintains his office in the Courthouse."

I find no authority of law authorizing a county to furnish stationery for the use of the County Solicitor. In this connection I call your attention to Section 9604, Code of Alabama, 1928. (Michie.) which is as follows:

"Section 9604. Stationery of officers paid for by county.—The Judge of Probate, Tax Assessor, Tax Collector, Register of the Circuit Court in Equity, Clerk of the Circuit Court, Sheriff and the County Treasurer or Custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the Court of County Commissioners, Board of Revenue or other like governing body, and the Judge of Probate shall also be allowed expense for his seal of office, to be paid for by the county."

I refer you to an opinion of this office heretofore rendered dealing with this question. Biennial Report, Attorney General, 1926-28, page 695.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 8, 1937

Hon. Saxon P. Poyner,
Judge of Probate,
Dothan, Alabama.

1. License Inspector not entitled to citation fee of $1.50 in cases where citation was served by lawful officer other than License Inspector, but such fee should be paid officer serving citation.

2. Citation fee of $1.50 due State Highway Patrol officer for serving license citation on delinquent should be paid to Highway Patrol Fund.

3. License Inspector not on a salary is entitled to a penalty of fifteen per cent payable to Probate Judge by delinquent even though citation is served by another lawful officer.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of December 2, in which you submit the following:

"We have several citations filed in our office and some of which have been collected for which were served by the State Patrol.

"Please advise who is entitled to the citation fee when same is served by the State Patrol or any other officer other than License Inspector.

"Who is entitled to the delinquent fee of fifteen per cent when the citation is served by an officer other than the License Inspector?"

Responding to the above inquiries, it is my opinion as follows: (a) That any lawful officer of the State of Alabama is authorized to serve a citation for delinquent license; (b) That the officer serving such citation is entitled to the fee of $1.50 prescribed by law for such services; (c) That any State Highway Patrol officer may serve such citations, but he is not entitled to receive the fee which is collected; (d) That it is the duty of the Probate Judge, or other collecting agency, to pay to the Highway Patrol Fund the citation fee due the State Patrol officer; (e) That the License Inspector, if he is not on a salary, is entitled to receive the fee of fifteen per cent paid by a delinquent who has been served with a citation by a lawful officer other than the License Inspector.

In support of the conclusion which I have reached I invite your attention to certain provisions of law which I quote as follows: "All citations to delinquents shall be served **by any lawful officer,** or by the License Inspector, or his Deputy, who shall be allowed a fee of $1.50 for each citation served to be taxed against the delinquent." Section 353 (on page 560) Article 14, House Bill 324, 1935 Acts of Alabama, approved July 10, 1935.

"No State Highway Patrol officer shall be entitled to any costs for attending any courts, but instead, the proper authority shall collect such fees and mileage that are due such officers for attendance on any court or **for any official act,** and to promptly turn same into the Highway Patrol Fund, and it shall become a part thereof, such fees and mileage to be expended as other moneys in said fund are authorized to be expended." Section 11, (page 756) of an Act Number 331, H. 545, 1935 Acts of Alabama, approved Sept. 2, 1935. "That all laws or parts of laws in conflict herewith be and the same are hereby repealed." Section 12 (page 756) of an Act No. 331, H. 545, approved Sept. 2, 1935, 1935 Acts of Alabama. The provisions of law first quoted above authorize citation to be served by any lawful officer and allows a fee of $1.50 to be paid the officer serving the citation. It is apparent that service of citation on a delinquent is not confined to a License Inspector.

The Act establishing the Highway Patrol prescribes a salary to be paid each Patrol officer and directs that the proper authorities shall collect such fees as are due such patrol officer "for any official act," and shall pay the fees into the Highway Patrol Fund. Service of a citation by a Patrol Officer is an official act for which he is entitled to a fee of $1.50 and which the Probate Judge shall pay over to the Highway Patrol Fund.

It is obvious, in my judgment, that it was the intention of the Legislature of Alabama to exclude any Patrol Officer from participating in any fees and

to confine his remuneration for services rendered to the salary fixed by the Act establishing the office. All such fees due any Highway Patrol officer, therefore, should be turned over to the Highway Patrol Fund.

With reference to the penalty of fifteen per cent imposed on all delinquents in the payment of license, this office has previously held that the money so collected should be paid to the License Inspector if he is not on a salary. I refer you to my opinion of November 22, 1935, addressed to Hon. Henry S. Long, President, State Tax Commission, published in the Quarterly Report of the Attorney General, October through December, 1935, page 203 in which I held that the imposition of the penalty was made automatic even though no citation was served and that such fee should be paid the License Inspector. There is no provision of law which diverts the license fee from the License Inspector to any other lawful officer serving citation.

Quarterly Report, Vol. I, page 203.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 8, 1937

Hon. W. Perry Calhoun,
Representative, Houston County,
Dothan, Alabama.

Members of the Legislature are not prohibited by Section 5024, Code of Alabama, 1923, as amended, from entering into a contract of employment with the governing body of a County.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of March 1, 1937, in which you request an opinion of this office asking whether or not you are prohibited from entering into a contract of employment with the Board of Revenue or Court of County Commissioners for professional services because of the fact that you are a Member of the Legislature.

The Court of Appeals of this State in the recent case of Percy M. Pitts v. Chilton County, et al (MS.) held that a Member of the Legislature could not legally contract for services to be performed for the County.

This opinion was rendered, however, prior to the passage and approval of House Bill 300 of the 1936-1937 Extraordinary Session of the Legislature.

The last mentioned Act limited the operation of Section 5024 of the Code of Alabama, as follows:

"but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be

construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County."

In view of the above quoted provision, I am of the opinion that you can legally enter into a contract for professional services to be performed for the County even though you are a Member of the Legislature.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 15, 1937

Hon. H. M. Harper, Chairman
Unemployment Compensation Commission
Montgomery, Alabama.

Alabama Unemployment Compensation Commission—Under Act approved April 9, 1936, persons who gather crude turpentine gum held exempt from provisions of the Alabama Unemployment Compensation Act, while those who process such products are not exempt.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of March 12, 1937, in which you ask whether under the recent opinion of this office addressed to Hon. J. L. Kaufman, former Chairman of the Alabama Unemployment Commission, under date of March 4, 1937, it necessarily follows that all labor performed in producing, "crude turpentine gum (oleoresin) from a living tree, or trees, of the pine species, and the services performed in processing gum spirits of turpentine and gum resin from crude turpentine gum (oleoresin), and processed by or for the account of the original producer of the crude turpentine gum (oleoresin), is agricultural labor. You request particularly information as to whether the labor of persons who cut the pine trees, whether the services of those who gather the sap, and whether the services performed in processing the gum spirits are classified as agricultural labor, in view of House Bill 58, approved April 9, 1936.

I am of the opinion that the Act approved April 9, 1936, supra, does not necessarily exempt all services in connection with the finished products mentioned in that Act, from the provisions of the Alabama Unemployment Compensation Act. In reference to the specific services which you mention, I am of the opinion that the services of those who cut the pine trees and those who gather the sap, should be classified as agricultural labor under said act, and that persons performing such services are exempt from the Alabama Unemployment Compensation Act.

I am of the opinion that services performed in the processing of gum spirits are not necessarily exempt and that under suitable regulations of your department, that those engaged in such employment would not be exempt from the terms of the Alabama Unemployment Compensation Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

County Commissioners—Not authorized to pay joint electric bill for jail lights and electric stove used by jailor for private purposes, even though such joint bill is less than prior single bill for jail lights.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter which I quote as follows:

"The electric rates in Dothan are based on equipment used to a great extent. An electric stove installed in the Jail and used both by County Health Officer in sterilizing instruments and boiling water as well as for cooking by the Jailor, will effect a considerable saving to the County on its bill each month.

"You have heretofore ruled that Counties were without authority to pay for current used in cooking for the Jailor and his family. I would like to know if the stove is bought by him and hooked on the same circuit as the lights used by the County, and which would reduce the monthly light bill to the County, if in that instance and considering also that it would be used by the Health Officer, whether same would be legal. In other words would the County be justified in paying a light bill on which a stove is connected when such bill would be less than it was before the stove was connected, the combination rate where a stove is used being so much cheaper than the straight light rate?"

I think your inquiry should be answered in the negative. The economy which you state may occur is speculative. The only reasonable way that Commissioners could determine whether or not an economy has resulted would be to compare the electric light bills rendered after such installation with those rendered prior thereto. Even this comparison might not be in my judgment, an adequate gauge as to whether or not there is any economy. An element of doubt might still exist.

Even though it could be definitely established that an economy has resulted, I cannot escape the conclusion that the bill which was paid included an amount for current consumed by the jailor for his own domestic purposes; and that would be true irrespective of the fact that the county is paying less than it otherwise would have had to pay in the absence of such a joint arrangement.

The law does not authorize the County to pay for any current which the jailor uses for his private purposes, neither does it give permission for such payment provided the total amount to be paid does not exceed the amount authorized to be paid in the absence of such a joint arrangement.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. G. H. Howard,
Probate Judge,
Wetumpka, Alabama.

Court of County Commissioners authorized to select present office as office of Judge of Inferior Court of Elmore County and pay telephone expense, under Act, page 24, Special Acts 1935.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of March 1 requesting my opinion as follows:

"Elmore County, by special Act of the Legislature, which will be found on page 24, Special Acts of 1935, created an Inferior Court for Elmore County. The Inferior Court Judge in this County has his office outside the courthouse and has his private practice conducted in said office in addition to his services as Inferior Court Judge.

"Please advise if Inferior Court Judge of this county under the conditions as outlined, is entitled to have paid by County his office rent of $5.00 per month; also whether County can legally pay telephone bill of $3.00 per month."

The decision as to where the office of the Judge of the Inferior Court of Elmore County shall be located is in the discretion of the Court of County Commissioners. The restrictions placed upon them are that such office be suitable and that it be located in Elmore County. Section 23 of the act creating this court, cited in your letter, provides in part as follows:

"The Judge of said court shall keep an office in the courthouse of said county, **or in such other suitable place** in Elmore County as the Court of County Commissioners may provide; and it shall be the duty of the said Court of County Commissioners to provide such office for said Judge, and to furnish and supply the same with the necessary fixtures, stationery, stamps, **telephone,** lights, heat, etc.————————." (Underscoring ours).

In my opinion, it is within the discretion of the Court of County Commissioners to select the present office of the incumbent, if they decide that it is a suitable place and if it is in Elmore County, and if they make such selection they will be authorized to pay the rent and telephone charge.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Mrs. Macie Thrasher,
State Prison Inspector,
Tuskegee, Alabama.

The county will not furnish fuel for cooking for prisoners neither lights nor water for lighting the sheriff's residence even though it is connected with the jail.

Opinion by Assistant Attorney General Haynes.

Dear Madam:

I have your letter of November 23, 1936, in which you request my opinion as follows:

> "I would like to have a ruling as to whether or not the Counties are allowed to pay for the Sheriff's fuel, cooking for the prisoners, light and water, where the Sheriff's residence is connected with the jail. Would the State allow the Counties to pay for same?"

There is no authority of law for allowing such charges as you enumerate above. I call your attention to the following opinions of this office: **Quarterly Report of Attorney General,** Vol. II, page 243; **Quarterly Report of Attorney General,** Vol. II, page 241. See also **Holcomb vs. Mobile County,** 229 Ala. 77. The fact that the Sheriff's residence is connected with the jail makes no difference. This does not allow him to require the County to pay for the items listed in your request where part of such items are being used by him and his family for lighting and upkeeping the home of the jailor or the Sheriff. The opinions above cited so hold.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. J. Street Sandlin,
Sheriff, Morgan County,
Decatur, Alabama.

Sheriffs—entitled to arrest fee out of Fine and Forfeiture Fund in cases nol prossed or dismissed, or when defendant is acquitted in Morgan County Court where warrant is issued on affidavit.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 21, 1936, in which you present the following inquiry:

> "In cases nol prossed or dismissed, or when defendant is acquitted in the Morgan County Court, where warrant is issued on an affidavit, is the arrest fee a proper charge against the fine and forfeiture fund of the county? If not a proper charge against the fine and forfeiture fund, how should this fee be collected?"

I am of the opinion that your inquiry should be answered in the affirmative.

Section 3741, Code of Alabama, 1923, which is the schedule of fees for sheriffs in criminal cases, provides in part as follows: "For executing warrant or writ of arrest in misdemeanor cases . . . . . $2.00." Local Acts 1931, p. 139, is the last expression of the Legislature that I am able to find relative to the County Court of Morgan County. Section 12 of said Act imposes upon the

sheriff the same duties as to preserving order, and executing all writs or process and performing such other duties in all respects as in the circuit courts of this State. Moreover, Section 3758, Code of Alabama, 1923, providing for fees in the county court, states that sheriffs shall receive the same fees as are now allowed by law to them for similar services in the circuit court. This section merely adopts provisions of Section 3741 touching this class of fees.—**Kilgore v. Swindle,** 219 Ala. 378.

Section 4039, Code of Alabama, 1923, as amended by Acts 1927, p. 45, provides for the payment of fees of officers out of the Fine and Forfeiture Fund in criminal cases under certain conditions. This section, in my judgment, is applicable to the fees of the sheriff in connection with the County Court of Morgan County.—**Biennial Report of Attorney General, 1928-1930, p. 194.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Costs in Probate Court--Become due and payable in same manner as in Circuit Court.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Since the passage of the 'Granade Act' the fees of this Court are payable to the State and County. It is therefore necessary that I take such legal steps as I can to collect costs which accrue in this court and if I did not take such action I and my bondsmen would be liable for misfeasance in office.

"The steps allowed me to collect costs are, of course, to issue execution for the collecting of costs, and as I understand the law, executions cannot be issued within ten days of the date the costs become due and payable and must be issued within ninety days from said date.

"I would therefore appreciate your writing me an opinion as to the time in which costs become due and payable in the Probate Court."

Answering your inquiry I call your attention to Section 9600 of the Code of Alabama of 1923 which provides as follows:

"9600. RULES OF EVIDENCE; PLEADING AND PRACTICE.—The provisions of this Code in reference to evidence, pleading and practice, judgments and decrees, in courts of law and equity, so far as the same can be made appropriate and the mode of obtaining evidence by oral examination or by deposition, and of compelling the attendance of wit-

nesses, and of enforcing orders, decrees and judgments, in the absence of express provision to the contrary, are applicable to proceedings in the court of probate."

It is my opinion that this section applies to costs due and payable in the Probate Court as well as to the other matters specifically mentioned. I do not find express provision dealing with the manner and time of issuing execution for costs in the Probate Court. Section 9600, therefore, authorizes the collection of costs in Probate Courts by the same method provided for collecting costs in law and equity cases.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. S. G. Johnson,
Judge of Probate,
Lamar County,
Vernon, Alabama.

Uniform Firearms Act—no fee provided for the issuance of license.

Opinion by Assistant Attorney General Screws.

I have your letter of October 5, 1936, which is as follows:

"Please advise if probate judges are entitled to 50c for issuing pistol license under Act No. 82, S. 63, Simpson, 1936 Acts, page 51."

I am of the opinion that your inquiry should be answered in the negative

The Act to which you refer is known as the "Uniform Firearms Act," Acts 1936, p. 51. There is no provision contained in said Act providing for a fee for the issuance of said license. The general provision providing for a fee to the Probate Judge for issuing license is not here applicable as the act in question is a specific act dealing in full with a specific subject. Special provisions relating to specific subjects control general provisions relating to general subjects, and things specifically treated will be considered as exceptions to general provisions. Herring v. Griffin 211 Ala. 225, 100 So. 202.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. T. L. McKee,
Tax Collector, Chilton County,
Clanton, Alabama.

Tax Collector—Liability for loss of public funds through burglary under facts submitted, officer liable for loss.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

You wish me to advise you whether or not you are personally liable for loss of public funds collected by you. You state that the loss occurred under the following circumstances:

"On the 29th day of December, 1936, while my clerk and I were out of our office during the lunch hour some unknown party or parties entered my office and took from the cash drawer $166.07 in money. My office, as tax collector, is located in the Court House on the ground floor and the money was confined and locked in a steel cash drawer built into the counter and this was the only place provided by the county for the safe keeping of said money until the same was deposited in the bank, and there was no vault or safe provided. At this time I had two clerks and when we left to go to lunch around 12 o'clock the windows of my office were locked and the money was locked in this steel cash drawer and the door to my office was also locked and upon returning to the office around 1 o'clock, we discovered that the office had been entered and the drawer pushed open and was left open and said sum of money was missing. I make deposits in the bank at the close of each day's business."

In response to my request for additional information concerning the loss of these funds, you wrote me again as follows:

"In addition to the information given you on January 13, 1937, I will advise that the tax collector's office is a small room about 12 ft. x 14 ft., with no vault nor safe nor any place where a person could conceal himself and be left in the office. The door was locked, when we left for lunch and was locked when we came back. It showed no sign of being pried open, which convinces me that the door was opened by a pass key.

"My cash drawer was pried open with some hard metal instrument and had the marks left on it which were bright and the drawer was bent out of shape and left open.

"There are two windows in the office, which were locked when we left the office and were locked when we came back.

"I have never loaned my keys to anyone and there is no other key, to my knowledge, to the door of the cash drawer.

"Immediately upon returning to the office, discovering it had been robbed, I notified the sheriff, deputies and police department.

"The money that was stolen from this office belonged to the State of Alabama and Chilton County, and was collected in the morning of the day on which it was stolen.

"The banks here close at noon for one hour, but we have made arrangements with the bank to make our deposit at 5:00 P. M., to take care of the money we collect between 3:00 P. M., the hour the bank closes, and 5:00 P. M., the hour the office closes."

The facts and circumstances in each case determine liability of a Tax Collector for loss of public funds through burglary or robbery. It is my opinion that the facts set forth in your communication do not exonerate you from liability for the loss of the funds which you mention.

I quote from a recent opinion of this office, dated January 7, 1937, to Hon. Frank O. Deese, Judge of Probate, Ozark, Alabama, as follows:

> "If, however, in the discharge of your official duties and in your official capacity as Judge of Probate, you exercise the highest degree of care, diligence, and vigilance to prevent loss and you are robbed of public monies by an irresistible force which you could not have foreseen and guarded against, this would constitute a good defense to an action on your official bond; but if the money of which you were robbed was not the same money which you had collected or if you have committed an official default by failure to pay the money into the treasury as the law requires, such robbery would be no defense."

Reference is made to the case of the **State of Alabama v. Houston,** 78 Ala. 576, which decided the liability of the Tax Collector for loss of funds through robbery. I quote from page 585 of this decision:

> "From the course and character of the legislation, on principles of public policy, the only reasonable inference is, that it was the intention to exact of officers charged with collecting, and paying over public revenue, the highest care, vigilance and diligence known, to the law, such as a very prudent and cautious man exercises in respect to the most important matters. Our conclusion is, that while the official bond does not impose absolute and unconditional liability, the statutory provisions, and consideration of public policy enlarge the degree of responsibility beyond that of a mere bailee for hire; and if, having observed the highest care, vigilance, and diligence to prevent loss, the Collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money."

The question presented for my determination is whether or not you observed the highest care, vigilance and diligence to prevent the loss. I am compelled to state that my conclusion is to the contrary. The cash drawer in which you left the money at noon seems to me was a very flimsy affair if it could be pried open with some instrument. You might reasonably have anticipated that someone could obtain a pass key to fit the door or that someone could have adjusted the lock on the door to prevent it locking when the door was slammed at noon, if such was the case. The money you left in the cash drawer was not a very large amount but I am quite sure that if the sum had been much larger you would not have taken the risk of leaving it in a flimsy cash drawer which seems to be the case in this instance. You probably would have been more cautious and would have left somebody there at noon or you would have taken the money to the bank a little while before 12 o'clock and there deposited it in your usual manner of caring for public funds. The fact that the sum was small did not lessen the degree of care, vigilance and diligence required of you by law in protecting these funds. Since the sum was small, one detail of vigilance and diligence that you could have observed was to have taken the money with you when you went to lunch. There are many different details of caution, diligence and prudence which you could have observed in protecting these funds and which would have exempted you from liability therefor. Since you chose to run the risk of leaving the funds in a small steel cash drawer inside of your office which was locked, I cannot see as a matter of law, or as a matter of fact,

that you observed the righest degree of care, vigilance and diligence which the law, as set forth in the case of the State v. Houston, supra, requires of you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Mrs. C. H. Thrasher,
Prison Inspector,
Walker County
Jasper, Alabama

Jails—Walker County has no authority to hire assistants to the day jail guard and night jail guard provided for by Act No. 133, Local Acts 1933, p. 37, approved April 11, 1933.

Opinion by Assistant Attorney General Garrett.

Dear Madam:

I have your letter of December 28, 1936, which follows:

"I call your attention to Act No. 133 of the Local Acts of 1933, page 37, creating the office of night and day jail guards for Walker County, Alabama. In connection with the above Act, please render me an official opinion on the following question and facts:

"Walker County has erected a new four-story jail. This jail is now manned exclusively by the day jail guard and night jail guard, provided for by the Act above referred to. It is almost a physical impossibility for these two men to perform their services as guards and at the same time act as janitors in the cleaning and firing of the jail. It is almost imperative to the proper care of the jail building that the guards authorized by the act mentioned above be allowed assistants to aid in the performance of these janitorial duties. Please advise me as soon as possible whether the county may hire assistants under the above act or under any other act or Code section that may be known to you."

In reply, I advise that I am of the opinion that your inquiry should be answered in the negative.

The positions of day jail guard and night jail guard of Walker County were created by Act No. 133, Local Acts 1933, page 37, approved April 11, 1933, which is the act referred to in your letter of inquiry, Section 1 of this Act reads as follows:

"Section 1. There is hereby created the offices of day jail guard and night jail guard for Walker County, Alabama, who shall be appointed by the Sheriff of said County, and hold office at his will. The term of office of such guards shall be during the term of the Sheriff appointing them, unless sooner terminated by the Sheriff making the appointment, who is hereby vested with the power to terminate such service or office at his will. **Said day guard shall be in lieu of and shall perform all such duties, work and services now performed by the jail jani-**

tor furnished by Walker County, and said night guard shall be in lieu of and shall perform all such duties, work and services now performed by the night jail watchman furnished by Walker County. Said guards shall guard the Walker County jail and prisoners therein, look after the comfort of such prisoners, and perform all other duties as are now required by law of the night jail watchman and day jail janitor, and may perform such other work and duties as are required by law of deputy sheriffs of Walker County, having been appointed and duly qualified for such office, or as may be required by the Sheriff of Walker County as such guards or deputies." (Emphasis ours).

The Act then provides for the compenstion of the day jail guard and night jail guard, by whom the same shali be fixed, how the same shall be paid and then provides that all laws and parts of laws in conflict therewith are expressly repealed, whether general or local.

In view of the express and specific provisions of the above quoted part of the 1933 Local Act, supra, for Walker County, which definitely fixes the duties to be performed by the day jail guard and the night jail guard and provides that the same shall be in lieu of all such duties, work and services now performed by the day janitor and by the night jail watchman, respectively, and further provides that they shall guard the prisoners, look after their comfort and perform **all other duties** as are now required by law of the night jail watchman and the day jail janitor, etc., it is my opinion that Walker County does not have the authority to employ assistants to aid these men in the performance of these duties.

If conditions are such that it is imperative that these men be given assistants, then this is a matter that addresses itself to the discretion of the legislature.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. H. W. Clayton,
Clerk, Circuit Court,
Guntersville, Alabama.

The lien which the State of Alabama has under Section 2603 of the 1923 Code of Alabama, on the property of the Clerk of the Circuit Court is discharged at the end of one year after expiration of the term of office of the Clerk, provided there is no unsatisfied judgment against his bond and no suit pending thereon.

The present Clerk of the Court who holds, under garnishment, funds belonging to the former Clerk whose office has expired more than one year is not liable to the State of Alabama for the garnished funds.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of November 10, 1936, which states as follows:

"On November 6, 1928, one Woodie Lewis was elected clerk of the Ciruit Court of Marshall County. He executed his bond, conditioned as required by law in the sum of $10,000 with the Union Indemnity Company as his surety. He executed another bond for $1,000 as ex-officio clerk of the county court. In February, 1932, he resigned.

"On January 11, 1932 anaudit was made by the Comptroller's office, He was found or reported to be short in his accounts at that time on both bonds. Suits were filed at that time or shortly thereafter against him and his surety on both bonds. Judgments were obtained against him and his surety on both bonds. The sum total of all judgments obtained on his county court bond exceeded the $1,000 liability. The surety paid the $1,000 and costs in release of these judgments on the county court bond. It also paid the judgments on the $10,000 bond. Several hundred dollars was collected from Lewis in addition to this for Marshall County on fines and county court before the judgments were taken.

"On August 5, 1932 some six months after Lewis resigned, The Maryland Casualty Company et als, who were the owners and transferees of the ex-clerk's cost belonging to the former ex-clerk, H. J. Miller, filed suit in the Circuit Court against Lewis and his surety on the $10,000 bond, claiming $780.00 for monies collected by Lewis belonging to them as transferees of Miller, received by Lewis in his official capacity and not accounted for.

"Lewis, in the meantime, transferred by an instrument in writing to his surety, The Union Indemnity Company, all of his uncollected costs in the Circuit Court, and in the county Court. Following this, I collected for The Union Indemnity Company of the costs formerly belonging to Lewis, $265.40. The Maryland Casualty Company et als obtained and had served on me a writ of garnishment in the suit that had been brought against Lewis and his surety, The Union Indemnity Company. Following this, The Union Indemnity Company went into the hands of a receiver. I understand it has other property transferred to it by Lewis that is yet in the State of Alabama. On October 21, 1936, judgment was rendered against Lewis and his surety, and the funds garnished of $265.40, which I admitted under answer as garnishee, as being indebted to defendant, was ordered by me paid to plaintiff, and judgment rendered against me therefor.

"It now appears that possibly Lewis is yet short on some costs collected that has just recently been discovered, that is due the State and County. The surety on his $10,000 bond on the last audit made on January 11, 1932, paid to the State the amount shown by that audit to be due the State. Auditors are here now, and have instructed me not to pay this judgment off until I get an opinion from you.

"I would call your attention to Section No. 2603 of the Code, which creates a 'lien upon the property of the principal from the date of it's execution; but such lien is discharged at the end of one year after the expiration of the term of office of the principal, if no unsatisfied judgment exists against said bond, and no suit is pending thereon.' This is the only lien created by statute as I find on official bonds. This section is, of course strictly construed. The term of office of Mr. Lewis expired in January, 1935. More than one year has expired since that date. Please tell me:

"First: Has the State of Alabama, or any other persons, who had no suit pending, a lien on these funds after January, 1936, one year from the date of the expiration of the term of office of Mr. Lewis?

"Second: Will I be protected in making payment of the judgment obtained against me as garnishee, as against any other person or the State of Alabama, who may hold a claim against Mr. Lewis, the judgment against me having been made final?

"Third: At the end of one year after the expiration of the term of office of Mr. Lewis, were all liens discharged on his official bond except such liens that might be kept alive by having a suit in their favor at the time pending?"

It is my opinion that any lien existing in favor of the State of Alabama, or any other person, was discharged at the end of one year from the expiration of Lewis' term of office, provided there was no unsatisfied judgment and no suit pending on the bond in favor of the former lien holder.

I direct your attention to Section 1491 of the 1907 Code of Alabama which reads as follows:

"The bond of the judge of the probate court or the county clerk, or the sheriff, or the clerk of the city or circuit court, or the tax assessor, or the tax collector, and of the county treasurer, is a lien upon the property of the principal from the date of its execution."

The above section again appears in Section 2603 of the 1923 Code of Alabama, but there has been an addition which reads as follows:

" * * * but said lien is discharged at the end of one year after expiration of the term of office of the principal if no unsatisfied judgment exists against said bond, and no suit is pending thereon."

The Legislature of Alabama, I presume, wanted to provide a time when this lien on the property of the principal would expire. I presume that provision for expiration was made by this amendment due to the fact that the Legislature thought it would be unjust and unfair to the principal of the bond to continue the existence of a lien on the property of the principal for an indefinite period of time and thereby restrict the sale or other disposition of the property pending an audit by the State or until all questions of official liability had been definitely determined. It was, therefore, probably the intention of the Legislature to limit the existence of the lien in order that the principal may at a definite period, be free to sell or otherwise dispose of his property if he saw proper. I refer you to the case of Roebuck vs. Roberts, 117 So. Reporter, p. 32, in which the Supreme Court intimates that it has reached the same conclusion.

So far as the State of Alabama is concerned, or so far as any other person holding a lien upon the funds which you have in your possession as garnishee, I do not think that they have any lien or claim thereto under the facts set forth in your letter. You probably would be safe in paying the money to the judgment creditor.

It is my opinion that all liens upon the property of the ex-clerk Lewis have expired, provided there is no unsatisfied judgment against his bond and no suit pending thereon.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Wm. A. Conrad,
Deputy Clerk, Circuit Court,
Mobile, Alabama.

All solicitor's fees earned by a solicitor on salary in misdemeanor cases in the County Court, Inferior Court or other court of like jurisdiction go to the County Treasurer, all fees earned in the Circuit Court including misdemeanors go to the State Treasurer except salaries, commissions which go to the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 5, 1936, in which you request my opinion as follows:

"I have received returns on executions from the Sheriff in about 12 cases on final forfeitures of bonds. In said returns together with the amount of the judgment and costs the sheriff paid to me the Solicitor's Commissions of 5% on the amount of the judgment in each case. The final forfeitures in these cases were rendered prior to (Extraordinary Session 1936) March 26th, 1936, the date of the approval of (H. 110-DeVane) No. 54 which Act provided for only one Solicitor's Fee.

"I am aware of the fact that before the approval of the above said Act the Solicitor's fee should be paid to the State Treasurer.

"The points I am worried about are the following and for which I respectfully request your Honor's opinion:—

"1. Is there a difference or distinction between fees and commissions?

"2.. Should I pay said Solicitor's Commission to the State Treasurer or to the County Treasurer?"

Answering your request, presuming you have reference to fees of solicitors arising under Section 3738, Code of Alabama, 1923, and commissions of solicitors arising under same section where it says:

"On all forfeitures collected by the Clerk or Sheriff, 5% thereof."

We will discuss these in the order in which they come. Solicitor's fees either go to the State or County Treasurer depending on where the conviction is had. If had in the County Court, Inferior Court or other court of like jurisdiction, then such fees go to the County Treasurer under an Act approved March 26, 1936, General Acts, Extra Session, 1936, page 30, which is as follows:

"That Section 3759 of the Code of Alabama of 1923, be amended so as to read as follows: Section 3759; For every conviction for a misdemeanor in the County Courts or Inferior Courts there shall be taxed and collected as a part of the costs and paid into the County Treasury the same Solicitor's fees provided for conviction in such cases in the Circuit Court, provided that in the event of an appeal to the

Circuit Court no Solicitor's fees shall be taxed or collected for the services of a Solicitor in the Circuit Court."

If, however, a conviction for a misdemeanor is had in the Circuit Court this fee must go to the State Treasury, under Section 5511, Code of Alabama of 1923, which is as follows:

"5511. FEES OF SALARIED SOLICITORS PAID INTO STATE TREASURY.—All fees which may be by law taxed as solicitor's fees against defendants on convictions secured by a solicitor who is paid a salary by the state, belong to the state, and, when collected, must be paid into the state treasury."

The above, I think, disposes of solicitor's fees. This brings us to the discussion of commissions earned by the solicitor in fine and forfeiture matters under Section 3738 quoted above. In this connection, I call your attento Section 5515, Code of Alabama of 1923, which is as follows:

"5515. COMMISSIONS ON FINES AND FORFEITURES TO BE PAID INTO COUNTY TREASURY.—The five per cent commissions which such salaried solicitors are entitled to receive on fines and forfeitures must, when collected, be paid into the county treasury to the credit of the fine and forfeiture fund."

I think from the above quoted section provides that all such commissions go to the County Treasury whether from the County Court, Inferior Court or other court of like jurisdiction or the Circuit Court. The fine and forfeiture fund is purely a creature of the county and is supported as its name indicates by fine and forfeitures and the State in no manner participates in any part of this fund. I have not confined my answer to your question as suggested in your request but have answered them as a whole, placing both your questions under one general head.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. H. A. Terry,
Judge of Probate,
Hale County
Greensboro, Alabama.

Court of County Commissioners—Section 5076, Code of 1923, not applicable to contract existing at the time Probate Judge is appointed.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of the 5th instant, which I quote as follows:

"I was appointed to the office of Probate Judge of Hale County on March 2, 1937, to fill the unexpired term of Judge D. B. Borden, who died some weeks ago. Mr. Vaughan Terry is my son, and for a period

of several months before my appointment as Probate Judge, he sold gasoline to Hale County as an agent of the Gulf Refining Company, under a contract entered into between the County and Gulf Refining Company. In January 1937, prior to my appointment in March, 1937, this contract between the county and the Gulf Refining Company was renewed.

"I desire to inquire whether the existence of this contract at this time is violative of Section 5076 of the Code. I note that this matter has been construed on pages 256 and 438 of the Attorney General's Report for 1922-24, and by the Supreme Court of Alabama on page 17 of Volume 223, Alabama Reports."

It is my opinion that the existence of the contract referred to in your inquiry is not violative of Section 5076 of the 1923 Code of Alabama. The contract had already been made before you were appointed Judge of Probate of Hale County. The statute is intended to prohibit or to denounce contracts made with relatives within the prohibited degree by members of the Board of Commissioners and is not intended to prohibit or renounce a contract already in existence when a new member to the Board is appointed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

Hon. Saxon P. Poyner,
Judge of Probate,
Dothan, Alabama

Telpehones—If Circuit Solicitor occupies an office in the Court House the County may have a telephone installed and pay from its general funds the rent therefor and also all official calls made by the Solicitor.

Opinion by Assistant Attorney General Simmons.

I have your letter of September 10, 1936, giving a statement of facts and making the following inquiry:

"Kindly refer to 1933 Acts, page 201, Senate Bill No. 199 and kindly advise me as follows:

"No. 1. While the Circuit Solicitor has no office in the Court House can the Board of Revenue designate his office as one in which a telephone can be installed?

"No. 2. Is the Board of Revenue authorized to pay rental for same out of its General Fund?

"No. 3. Is the Board of Revenue authorized to pay for official calls made by the Circuit Solicitor?

It is my opinion that your questions should be answered in the affimative.

An Act approved April 19, 1933, Number 187, appearing on page 201 of the 1933 Acts of Alabama, authorizes your County governing body to designate which offices in the Court House may have telephone installed

therein. This Act is not in conflict with Section 6755 of the 1923 Code of Alabama, Sub-Section 16, as amended by Act of 1931, page 7559. See Quarterly Report of the Attorney General, Vol. One, page 193.

Answering your inquiry as to whether or not your Board of Revenue is authorized to pay for official calls made by the Circuit Solicitor, which I have already answered in the affirmative, I refer you to an opinion rendered by this office on October 26, 1931, to the Hon. W. C. Beebe, Attorney, Bay Minette, Alabama, Biennial Report of the Attorney General—1930-1932, page 515, in which the Attorney General referred to claims for long distance calls as follows:

> "The Commissioner's Court should scrutinize all such claims and be convinced that such calls were connected purely with the official duties of the officer and were necessary, and should never be allowed unless itemized statement is filed with the Commissioner's Court, showing the dates of such calls, from whom and to whom and the amount."

Care should be observed by the County governing body to see that the privilege is not abused.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Attention Hon. J. P. Shaffer, Assistant State Comptroller.

First: As many executions can be issued on a judgment as is necessary to enforce its collection.

Second: If a sheriff is armed with an alias execution issued on a judgment, he has the same authority and the same right to levy and enforce the same as he had under an original execution on said judgment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 11, 1937, in which you request my opinion as follows:

> "1. After an execution for costs or for costs and judgment has been returned to a court clerk by a Constable or sheriff marked "No Property Found," has the clerk authority in law to later issue an alias execution against the same party on whom such a return had been made and has the Constable or Sheriff the authority in law to take the steps to make money on such an alias execution that he would have the authority to take on an original execution?
>
> "2. If a Constable or Sheriff fails to act on an execution in his possession within the time limit for such action as is prescribed by law, would the clerk of a court have the authority in law to issue an alias

execution for the one not acted upon and would the Sheriff have the authority in law to enforce collection on the alias execution in the same manner as he should and could enforce collection on an original execution?"

Answering your first request I call your attention to Section 7802, Code of Alabama, 1923, which is as follows:

"7802. More than one writ may be issued.—More than one writ of execution may be issued at the plaintiff's cost, though the first be not returned; and when a fieri facias is returned not satisfied, or satisfied only in part, an alias fieri facias may be issued."

It seems to me the above section without question answers your first request in the affirmative and we think there can be no question that as many executions can be issued as necessary to enforce the collection of any judgment. If it were otherwise, the plaintiff might defeat his own judgment by having an execution issued which was returned "No property found." Even though the defendant came into possession of sufficient property the next day after such return from which the entire judgment could be realized. **Hopkins v. Land,** 4. Ala. 427; **Fryer v. Dennis,** 3 Ala. 254. The above citations are old, but they seem to have settled the law at that time and have been adhered to ever since, and the principle has been so well settled that no question has since been raised. As to this point, however, I might call your attention to still another case which throws light on this subject. **Steele et als. v. Thompson, Adm'r., 62 Ala. 323.**

My answer to your second proposition is in the affirmative, for the reason given in my answer to your first request and I call attention to the same authorities cited above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Hamp Draper,
Associate Member,
Board of Administration,
Capitol.

Under Section 4626, Code of Alabama of 1923 any person furnishing testimony or procuring the conviction of persons engaged in the manufacture of liquor, whether one or two or more, is entitled to $50.00 informer's fee.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 11, 1937, in which you request my opinion as follows:

"We request your opinion on the above stated subject with reference to an Act of 1933 which amended Sec. 4659 of the 1923 Criminal Code, reducing the fee from $50.00 to $35.00 and finally to $25.00. This fee

to be allowed a Sheriff or other person for furnishing information leading to the arrest and conviction of any person violating Sec. 4656 and 4657.

"The question at issue is: Does this act in any way effect Sec. 4626, and if so, to what extent with reference to the payment of a $50.00 fee for a Sheriff or other officer or person for furnishing information leading to the arrest and conviction of any person violating that part of the Code pertaining to the manufactory of prohibited liquors, which differs from the statutes pertaining to possession.

"For instance, an officer or other person brings about the conviction of three persons for operating one still at the same time. These men were arrested, indicted, tried and convicted jointly, would there be one fee of $50.00 or a $50.00 fee for each defendant? The statute sets out, in part, there shall be charged in the bill of costs the sum of $50.00 to be allowed the Sheriff or other person who furnished the evidence and brought about the conviction.

"If, in your opinion, there should be only one fee allowed in joint cases would there be allowed a fee in each case in the event of a severance?"

You will note the Act approved April 19, 1933, amends Section 4659, Code of Alabama. This section is found in Article 3, Code of Alabama, 1923, which has to do with manufacturing, selling, giving away, or having in possession still or other apparatus for manufacturing liquor.

Section 4626, Code of Alabama, 1923, is a part of Article 2, page 507, which has to do with "manufacture, sale. giving away, or otherwise disposing of prohibited liquor or beverages." The amendment cited above does not in any wise affect Section 4626 of Article 2, supra. I am, therefore, of the opinion that Section 4626, supra, is in full force and effect as it now stands in the Code of 1923. Biennial Report Attorney General, 1932-1934, page 533.

Now as to your question, that is, where two or more persons are jointly indicted, jointly tried and jointly convicted under Section 4627 for operating a still or manufacturing prohibited liquors the party furnishing the evidence and procuring the conviction would be entitled to a fee of $50.00 in each case as set out in Section 4626, supra. You will note this section says "whenever any person is convicted" a person convicted jointly with others is as much convicted as if he had been tried alone. The statute makes no mention of joint indictment or joint conviction, but simply says "for each conviction."

Therefore, it is my opinion that if more than one person is captured while engaged in the operating of a still and they are indicted jointly, tried jointly and convicted jointly, the party procuring the conviction by furnishing testimony or other information would be entitled to $50.00 as to each person convicted even though all of such persons were convicted for operating the same still at the same time and at the same place.

I am herewith enclosing a copy of an opinion rendered on September 4, 1935, to the Sheriff of Bibb County which fully answers these questions.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. L. J. Lewis,
Member Jury Board,
Russell County,
Seale, Alabama

Term of Jury Commissioner, Russell County, ends under Section 280, Article XVII of the Constitution, when the incumbent assumed office on January 18th, 1936, as member of County Commission of Russell County, Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of December 8th, 1936, as follows:

"I am at the present time a member of the Jury Board of Russell County.

"I have been elected as member of the County Commission of Russell County and under the law creating the County Commission of Russell County my term on said Commission will begin on January 18th, 1937.

"Please advise me whether my term as Jury Commissioner will end when I qualify as Commissioner or will continue until January 18th, 1937, when I begin serving on the Commission."

It is my opinion that you vacate your office as Jury Commissioner when you actually assume your duties as County Commissioner on the 18th day of January, 1937. The Constitution, Section 280, and sub-section 7, section 2575 of the 1923 Code of Alabama, both forbid you holding two offices of profit at one and the same time.

It is my opinion that you do not begin "holding office" until you have actually assumed the occupancy and duties of the office. In the case of Shepherd vs. Sartain, 64 Southern Reporter, page 57, Mr. Justice Somerville, as reported on page 61, last paragraph, said: "..... that is, the occupation—of two offices at the same time that offends public policy, and is therefore forbidden by law." Further judicial determination by Mr. Justice Somerville is reported at the bottom of page 62, Shepherd vs. Sartain, supra, as follows: "Conceding the validity of these propositions, the conclusion stated does not follow. 'Holding office' within the inhibition under consideration, means qualifying and thereby entering into the office and assuming its obligations and becoming invested with its powers."

The evil sought to be forbidden by the prohibition against holding two or more offices of profit at one and the same time is the holding of more than one office under the state for which the occupant draws pay. You will not begin drawing your pay as Commissioner of your County until you actually assume the duties of the office on the 18th day of January, 1937, at which time you will immediately vacate your office as a member of the Jury Board of Russell County for the reason that the two offices

are incompatible and are offices of profit within the meaning of the constitutional inhibition—Section 280 of the Constitution.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. M. W. Forman,
Judge of Probate
Ashville, Alabama

County not required to pay feed bill of escaped prisoner for which they would not have been chargeable had the prisoner not escaped.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1937, in which you request my opinion as follows:

"Please advise if the county can legally pay a feed bill for prisoners who have escaped from the county jail, before said prisoners have been indicted by the grand jury or tried in any court."

My answer to the above is in the negative. I am aware that Section 3750 of the Code of Alabama, 1923, provides among others things as follows:

"No sheriff must be paid out of the state treasury any fee or allowance whatever, on account of any prisoner who has escaped from his custody; but the commissioners' court may, in their discretion, pay such fees and allowances as are payable by the county, notwithstanding the escape of the prisoner, if satisfied that such escape was not caused by the connivance or negligence of the officer having charge of him."

You will note the above says "but the commissioners' court may, at their discretion, pay such fees and allowances as are payable by the county." Note the words "payable by the county." This simply means such fees as were chargeable to the county in the first place and would have been a charge against the county had the prisoner not escaped, and could not mean or be interpreted to mean feed bills for which the State was liable if the defendant had not escaped.

Quarterly Report of the Attorney General, Volume II, page 291.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Charles W. Lee,
State Comptroller,
C A P I T O L .

Tax exemption is accorded to blind person on undivided interest in real property.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of inquiry as follows:

"If two or more individuals own undivided interests in real estate and one of the individuals is blind is any exemption accorded the assessment, and if so how much?"

This office has rendered several opinions on the right of a blind person to tax exemptions on real property which is authorized by Sub-Section F, 1935 Acts of Alabama, page 257. See opinions Quarterly Report of the Attorney General, Volume 3, page 67; Biennial Report, 1930-1932, page 976.

It is my opinion that the undivided interest of a blind person in real property is exempt from tax within the statutory limitation. If the assessed value of the undivided interest of the blind person exceeds $1200, then such excess is subject to ad valorem taxes imposed by the laws of Alabama. If such assessed value of the blind person does not exceed $1200 then the entire interest of said blind person would be exempt.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Dr. J. N. Baker,
State Health Officer,
CAPITOL.

(1) Local Act No. 11, approved March, 17, 1936, (Local Acts 1936, page 8) is constitutional.

(2) It is duty of Tax Collector of Escambia County, pursuant to mandates of Act No. 11, supra, to pay over and deposit all taxes collected under said Act to the County depository to the credit of the Escambia County Health Department.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry of the 21st instant from which I quote as follows:

"Will you please give an opinion on the following points:

1. Is Local Act No. 11, approved March 17, 1936 (Local Acts 1936, page 8,) constitutional?

2. If constitutional, is it not incumbent that all taxes levied and collected in keeping with the Act be paid over and deposited in their entirety to the credit of the Escambia County Health Department?

"May attention be directed to the fact that on August 1, 1932, favorable opinion was given as to the constitutionality of a similar act

operative in Conecuh County, (Biennial Report, Attorney General of Alabama, 1930-1932)?"

It is my opinion that your first inquiry should be answered in the affirmative. I have examined the House and Senate Journals which disclose that the bill received the required number of readings in the House and in the Senate, and that all constitutional formalities with reference to enactment of the bill were properly met. Every legislative Act is presumed to be constitutional, and every intendment is in favor of its validity. State vs. Street, et al, 117 Ala. 207.

I respectfully refer to the opinion of this office to which your letter refers (Biennial Report, Attorney General of Alabama, 1930-1932, page 951) I quote from the opinion as follows:

> "While the Constitution of the State of Alabama limits the power of the Legislature to authorize a County to levy a tax for general purposes in any one year on the value of the taxable property therein to one half of one per cent, it does not directly limit the power of the Legislature in prescribing for what purpose a portion of this one-half of one per cent shall be devoted. Southern Railway Company vs. St. Clair County, 124 Ala. 491; Frances vs. Southern Ry. Co., 124 Ala. 544. Provided such statute, at the time of passage, does not have the effect of impairing the obligations of contract, existing at such date, by destroying or impairing the remedy for their enforcement, it does not become unconstitutional or invalid by reason of subsequent events. Constitution of Alabama, Section 95, The State vs. Street, 117 Ala. middle of page 210."

Your letter of inquiry fails to disclose any facts which, if existing at the time, render the Act in question unconstitutional.

The Act makes an appropriation of the taxes collected under the Act to the Escambia County Health Department, directs where the money so collected shall be deposited, and provides how and by whom the money shall be expended. The act, in making the appropriation, does not limit the amount to a part of the money so collected, but stipulates that all taxes levied and collected as provided under the Act "shall be paid over and deposited by the Tax Collector of Escambia County in the county depository of said County to the credit of Escambia County Health Department." It is the duty of the Tax Collector to observe the mandates of the Act and to deposit all the money collected by him pursuant to the Act in the County Depository to the credit of the Escambia County Health Department.

This conclusion is reached upon the absence of any facts presented in your letter which render the Act unconstitutional.

I do not by this opinion mean to say that the word "all" includes the commission of the Tax Assessor and Tax Collector. This question is reserved for future consideration.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Thomas J. Arledge,
Road Supervisor,
Road Department, Chilton County,
Clanton, Alabama

Counties—Advertisements for bids for three trucks under facts stated is separable and bids may be made and awarded for only one truck. (General Acts 1936, page 3.)

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 21, 1937, which is as follows:

"In connection with my office as Road Supervisor of this County as provided under an Act of the State Legislature during its session early last year, I urgently request your opinion on the following transaction:

"Deference is made to the attached copy of Requisition No. 686 and copy of the advertisement 'Notice to Bidders.'

"You will note that three 1-1/2 ton trucks with hydraulic dump bodies were requisitioned; that the advertisement called for the same thing. It is also noted that no specific motor type was indicated; neither was any specific body indicated.

"On the strength of this four firms placed bids, one of whom only bid or proposed to furnish One Truck, the other three opposed to furnish the order as requisitioned and based their bids on the trade for the full order.

"The lowest bidder was given an order for one truck and the balance of the order was thrown out by a motion to reject by the Commissioner's Court who requested that a new requisition be filed by this office for re-advertisement for new bids on the other two trucks.

"Can I approve the purchase of the one truck on the order for three trucks? Is the low bidder not entitled to full order when his price was accepted? Can we reject part of his specified order and hold the low bidder to deliver the other part? Should a new requisition be made for the two other trucks?

The pertinent part of the advertisement attached is as follows:

"The Commissioners Court of Chilton County, Alabama, will receive sealed bids for: Three one and one-half (1½) Ton Trucks, equipped with 2 or 3 yards Hydraulic dump bodies.

"To trade in on this we have one International 1933 model truck; one Ford 1933 model truck; one Chevrolet 1933 model truck."

The purchase requisition is to the same effect as the advertisement.

In my judgment, provisions of the purchase requisition, and the advertisement, in question are separable and bids may be made and accept-

ed on only one truck. It is not necessary that bids be accepted on all three trucks although the bid is for three trucks. The purchase requisition is not such as will be necessary to purchase all three trucks at one and the same time. Since the provisions of the purchase order and the advertisement are separable, bids may be let on only one truck and rejected as to the other two.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. G. H. Boyd
Register in Chancery
Birmingham, Alabama

Register in Chancery required to pay over fiduciary funds to County Treasurer as required by Section 10465 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of December 8, 1936, from which I quote as follows:

"I would appreciate an official opinion on Section 7244 of the 1923 Code of the State of Alabama; that is, whether or not the section applies to Registers in Chancery as well as Clerks of Courts of Record.

"In the event this section does not apply to Registers in Chancery would I pay uncalled for witness fees into the County Treasury under Section 10465 of the 1923 Code of the State of Alabama?"

It is my opinion that your disposition of fiduciary funds as defined by Section 10549 of the 1923 Code of Alabama is governed by Section 10465 of the 1923 Code of Alabama. I do not think that Section 7244 of the 1923 Code of Alabama applies to a Register in Chancery, but that the official conduct of the Register in Chancery with reference to disposition of fiduciary funds is intended to be governed and controlled by said Section 10465. Section 10459 of the 1923 Code of Alabama specifically includes Registers as well as other officials, while Section 7244, supra, makes no mention of Registers and only specifically names Clerks. The Register is not a Clerk in the sense of Section 7244, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama

Filing tax— Filing tax on long term lease dependent upon the cash value at the date of making such lease of the interest conveyed. Recorded mortgage on property not deductible although taken into consideration in arriving at cash value of interest conveyed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date which is as follows:

"Please advise if, under Schedule 46 of the Revenue Law of Alabama of 1935, when a long term lease is offered for record, the value of any record mortgages existing on the property involved in the lease, should be deducted from the value of the lease, as determined by the Judge of Probate.

"We have not been deducting the amount of recorded mortgages from the value of the lease, and this question has been raised recently."

In answer to your inquiry, I am of the opinion that the recorded mortgages existing on property involved on long term lease are not deductible from value of the lease, although same should be taken into consideration in arriving at the cash value of the interest conveyed by such lease.

In discussing the filing tax due on long term lease in an opinion rendered to you under date of June 7, 1934, (Biennial Report Attorney General, 1932-1934, p. 568) the following is stated:

"In an opinion appearing in the Biennial Report of the Attorney General, 1926-1928, page 183, it was held that a long term lease conveyed an interest in real estate, and was subject to the filing tax dependent 'upon the cash value at the date of making such lease of the interest conveyed.' In an opinion appearing in Biennial Report 1928-30, page 538, the method of determining such present cash value was discussed and the table set out in Reiter Connolly Mfg. Co. v. Hamlin as Admr., 144 Ala. 220, was suggested, as a practical method of arriving at a fair result.

"The statute makes the tax payable on the value of the property conveyed. The determination of the value is necessarily a judicial question to be determined by the Judge of Probate in a judicial capacity. In the absence of fraud or palpable mistake, I assume his find of fact is conclusive.

"Applying the foregoing principles I suggest that you estimate or ascertain as best you can the total probable monthly rental and apply same method similar to the table suggested in the Hamlin case, to determine the present cash value of the interst conveyed, giving consideration to any special facts appearing in any particular case.

"The last paragraph is suggested as an aid to you. The Judge of Probate is the officer charged by law with the judicial ascertainment of the value of the property conveyed."

The amount of the recorded mortgage on the property in question, in my opinion, is not deductible from the amount of the value determined by the Probate Judge. However, in arriving at this value the Probate Judge should take into consideration the amount of the mortgage on the property. This is not like a deed which conveys property on which there is a mortgage. In that instance the actual value of the property is determined and the amount of the mortgage deducted. In the instance of long term leases the actual value of the property is not taken into consideration. The amount of filing tax due is dependent "Upon the cash value at the date of making such lease of the interest conveyed."—Biennial Report of Attorney General 1932-1934, page 568. supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

I. Ex-service men entitled to exemption in amount allowed by law on flying jenny license.

2. A deed given in lieu of foreclosure is subject to deed tax.

Opinion by Assistant Attorney General Knabe.

Dear Mr. Lee:

I have your letter in which you request my opinion as follows:

"1. Is an ex-service man entitled to an exemption for a license used for the purpose of operating a flying jenny under Section 64, page 207 of the 1935 Revenue Act and under Schedule 72, page 259 of the Revenue Code of 1929?

"2. A deed in lieu of foreclosure was given to a mortgagee, said deed providing that it was given for the purpose of saving the expense of foreclosure under power in the mortgage. No new consideration was given for the conveyance, the entire purpose being to cut off the equity of redemption and secure the statutory right of redemption of two years, same as if the mortgage had been foreclosed under the power in the mortgage. Does this sort of deed require a deed or mortgage tax?"

Replying to your first inquiry, I am of the opinion that veterans who meet all requirements of the Veterans Exemption Act (Acts 1935, page 1057) would be exempt from part of the license provided for the operation of a flying jenny prescribed by Sec. 64, page 207 of the 1935 Revenue Act. Prior to the enactment of the 1935 Veterans Exemption Act, veterans would be exempt under the provisions of the 1931 veterans acts.

In answer to your second inquiry, this department has previously ruled that a deed given in lieu of foreclosure is subject to a deed tax. See 1930-32 Biennial Report of Attorney General on pages 656 and 1024.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. D. E. Laslie,
Judge of Probate Court,
Macon County,
Tuskegee, Alabama.

Purchaser of second hand car, who is an individual, must buy tag therefor in the county of his residence.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of December 8, 1936, in which you give a statement of facts and make inquiry as follows:

"Please advise me if under Section 158-12 A of the 1936 Revenue Code, does a person have to buy his automobile tag in the county in which the person resides, or can he buy his tag in the county where he purchases his car if it is a second hand car."

It is my opinion that the purchaser of a second hand automobile who does not live in your county would be required to purchase a license tag for said automobile in the county of his residence and would not be lawfully authorized to buy it in any other county. Schedule 158.12 (a) of the 1936 Revenue Code of Alabama, page 523, is substantially the same as Section 18, Acts of 1927, page 139, which this office has construed on several occasions to mean that the purchaser of an automobile who is an individual, is not authorized to buy a license tag outside the county of his residence. Biennial Report, 1928-1930, pages 161-322-463. Biennial Report 1932-1934, page 428.

Therefore, it is my opinion that the person mentioned in your letter, if an individual, would not be authorized to buy the license tag in any county, but should make the purchase in the county of his residence.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Robert R. Moore,
Commissioner of Labor
CAPITOL.

Child Labor—Section 3502 of the 1923 Code of Alabama regulating the employment of child labor has no field of operation beyond the boundary lines of Alabama.

A parent, guardian, or custodian who permits or suffers a child under sixteen years to work in Georgia is not guilty of any offense because such work in Georgia does not violate Section 3502 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of December 16, 1936, which I quote as follows:

"In connection with a problem that has recently arisen in the enforcement of the Child Labor Laws of this State, your opinion is respectfully requested.

"It has been brought to my attention that there are a number of children who live in Phenix City, Alabama and are being employed by various stores and business houses in Columbus, Georgia, which is just across the river from Phenix City. These children go over to Columbus, Georgia each morning to their work, and return to their homes in Phenix City, Alabama each evening. The work in which such children are engaged, would if performed in Alabama, be in violation of Section 3502 of the Code of Alabama of 1923, which section reads as follows:

"'3502. EMPLOYMENT CERTIFICATE KEPT FOR INSPECTION. —No person, firm, or corporation shall employ, permit or suffer any child under sixteen years of age to work in any gainful occupation, except agriculture or domestic service, unless such person, firm, or corporation procures and keeps on file for the inspection of the officials charged with the enforcement of this chapter, an employment certificate, as hereinafter provided, for every such child; and unless such person, firm, or corporation keeps on file for the inspection of the officials charged with the enforcement of this chapter, a complete list of all such children employed therein; and no firm, person or corporation shall employ, permit or suffer any child between sixteen and seventeen years of age to work in any gainful occupation, except agriculture or domestic service, unless such person, firm, or corporation procures and keeps on file for the inspection of the officials charged with the enforcement of this chapter, an age certificate as hereinafter provided, for every child, between sixteen and seventeen years of age.'

"Is it a violation of the criminal laws of Alabama for persons, firms or corporations doing business in another State to employ children who are regular residents of Alabama, contrary to the above quoted statute?

"It would also appear that the parent, guardian, or custodian of children under the age of sixteen years, by permitting such children to work, would do so in violation of Section 3524 of the Code of Alabama of 1923, even though their work carried them into another State, provided they were regular residents of Alabama and returned to their homes in Alabama each evening when their day's work was finished. Section 3524 of the Code above referred to reads as follows:

"'3524. PENALTY FOR VIOLATION OF THIS CHAPTER.—Any person, firm or corporation who violates any of the provisions of this chapter, or who permits any child to be employed, or to work in or about or be detained in, or be in or about any establishment, contrary to law, or who fails or refuses to obey within a reasonable time any lawful orders or directions given by the state officials charged with the enforcement of this chapter, and any parent, guardian, or custodian under whose care or control a child under sixteen years of age is, who suffers or permits such child to work in violation of any of the provisions of this chapter, unless a special penalty is herein otherwise provided, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, and upon second or subsequent conviction of any violation of any of the provisions of this chapter, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars.'

"In order to prevent any confusion because of doubts which may exist concerning the application of these statutes, and the employment of children who live in Alabama, by employers in another state, which employment is contrary to the provisions prescribed by the laws of Alabama, your opinion is desired and would be greatly appreciated."

It is my opinion that neither the employers nor the parents of the children who are employed are guilty of any criminal violation of the sections of law mentioned in your letter. My conclusion is based upon the following reasons: The criminal laws of Alabama have no extra-territorial operation. I quote from the case of Green v. State, 66 Ala. page 40, with particular reference to the reasoning set forth on page 43:

"It may be conceded that the laws of no nation, can operate beyond its own territorial domain or jurisdiction, but local in their nature, and co-extensive only with the limits of the State by which they are enacted as said by Story J., in the case of The Appollon, 9 Wheat. 362 (6L). ED. 111), 'they must always be restricted, in construction, to places and persons upon whom the Legislature have authority and jurisdiction.' It is a safe principle, perhaps, to be asserted, that a crime committed in a foreign country, and in violation of the laws thereof, cannot, be mere legislative fiction or construction, be constituted an offense in another country."

Although, the employers of Georgia, if operating in Alabama, would be guilty of violating the laws of this State, they are not violating the law quoted in your letter, for the reason that the operation of this law is confined to the territorial limits of Alabama and cannot reach beyond the State of Alabama in its penal effect.

The parent, guardian, or custodian is prohibited by Section 3524, supra, from suffering or permitting a child to work in violation of Section 3502, and also in violation of other Sections of the chapter. There has been no violation by the Georgia employers and there is no duty on the part of the Georgia employers to keep on file an employment certificate as required by Section 3502, supra. Since there is no violation, the parent, custodian, or guardian has not suffered or permitted any violation contrary to Section 3524, supra, and therefore, would not be guilty of any offense for permitting the children

to go across the line and work in Georgia contrary to what is allowed or permitted in Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Probate Judge—Fee received for "celebrating rights of matrimony" is a part of the compensation of the office and is not a personal fee.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of recent date which is as follows:

"Under a recent opinion you held that when a Probate Judge was on a salary he was entitled to the fee for performing a marriage ceremony and that the same did not belong to the County.

"Would not this opinion apply to Probate Judges who are on a fee basis but are limited to $6,000.00 net?"

In your letter you refer to an opinion heretofore rendered by this office which is reported in the Quarterly Report of the Attorney General, Volume V, page 80. That opinion dealt only with Section 9005 of the Code of Alabama, 1923, overlooking entirely Section 7285 of the Code, supra, wherein are enumerated the fees to which a probate judge is entitled and among such fees is the following: "Celebrating rights of matrimony——$1.50."

This, to my mind, makes the performance of the marriage ceremony by a probate judge a part of his official duties. The mere fact that others can perform the service does not make it any the less an official duty when the ceremony is performed by the probate judge.

The opinion referred to above and which opinion is reported in Volume V of the Quarterly Report of the Attorney General, at page 80, is hereby expressly overruled.

I am of the opinion all probate judges must account for the fees collected for the performance of the marriage ceremony in the same manner as other fees are accounted for.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Fred H. McDuff,
Sheriff, Jefferson County,
Birmingham, Alabama.

A defendant is tried and convicted in the Jefferson County Court of Misdemeanors for petit larceny. Under the law he has five days in which to appeal his case to the Circuit Court unless he waives the same. The feed bill of this prisoner, pending these five days, should be paid by the State and not the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 11, 1936, relative to an opinion of this office written to Hon. Chas. W. Lee, Comptroller. The facts furnished by Mr. Lee as I gathered from his request, were that the defendant was held simply awaiting transfer to a road camp in your county. Nothing was said in this request about this retention being for the purpose of allowing the five days provided for appeal to expire. Had I known this, the opinion I wrote Mr. Lee would have been different. However, I might say here that the opinion written Mr. Lee is correct, based on the facts he stated. Your letter is as follows:

"John Doe is committed to the county jail of Jefferson County on August 1, charged with Grand Larceny. On August 9th, I am notified by the Jefferson County Court of Misdemeanors that the charges against Doe have been reduced to Petty Larceny and Doe is found guilty thereof.

"The Defendant has five days within which to appeal from the judgment of August 9th, aforesaid, and remains in jail in the interim. Having failed to appeal, the Jefferson County Convict Department, at the expiration of the five day period for appeal, assumes custody of Doe and transfers him to the County Convict Camp. Jefferson County Convict Department cannot lay hands on, work, or even take to the camp, this prisoner, until the expiration of the five day period for appeal, (unless, of course, the prisoner waives appeal).

"Question: which is chargeable with the cost of feeding this prisoner during this five day period, and before he is delivered to or available to the Jefferson County Convict Department, the State or Jefferson County?"

Under your statement of facts, I think it is clear that the feed bill for these five days allowed the defendant to appeal his case to the Circuit Court should be paid by the State as other feed bills. Certainly, the County cannot take the prisoner and transfer him to the camp during these five days that are allowed for appeal unless he waives this and consents to begin his term. Until this time has expired or he has waived the same, the case stands in status quo so far as the feed bill is concerned.

This is not overruling the former opinion of this office written Mr. Lee August 5, 1936, as, under the facts stated by him, it is correct, and this one, under the facts stated by you, we think also correct.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. A. G. Teague
Clerk, Circuit Court,
Ashville, Alabama.

All fines and forfeitures collected under Article 2 of what is known as the Highway Code and which includes Section 76, when collected must be transmitted to the State Treasurer and placed to the credit of the State Highway Department.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 6, 1937, in which you request my opinion as follows:

"Kindly advise me if a conviction had under Section 76, or any part thereof, General Acts 1927, page 376, would be construed as a violation of the highway laws of Alabama or is this act regulatory in nature and not violation of the highway laws?"

"A conviction was had in the Circuit Court of this county under the above Section and a fine of $150.00 imposed upon the defendant by the jury. The above information is desired in order to determine where the fine should be reported."

It is my opinion this fine goes to the State Treasurer to be credited to tne State Highway Department. You will note Section 106 of An Act approved August 23, 1927, General Acts 1927, page 348, which is known as "the Alabama Highway Code." This Section says:

"All fines and forfeitures collected upon convicion or upon forfeiture of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine or forfeiture is collected forwarded to the State Treasurer. All amounts received from such fines and forfeitures shall be credited to the fund of the State Highway Department."

The statute or section under which this conviction was had is section 76 and is a part of this Article and therefore the fine goes as indicated above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Dr. A. F. Harmon,
President, Alabama College
Montevallo, Alabama.

Night Watchman for Alabama College required to obtain permit to carry pistol.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter wherein you request an opinion as to whether or not the night watchman employed by Alabama State College must obtain permit to carry a pistol while on duty as a watchman on the premises of the Alabama State College.

Act No. 82, S. B. 63, approved April 6, 1936, provides for the licensing of persons carrying pistols. Section 6 of the aforementioned Act designates those persons who are exempt from the requirements of the Act.

I have carefully examined the aforementioned Section 6 and, in my opinion, a night watchman on the premises of Alabama State College does not come within any of the classes exempted.

I am, therefore, of the opinion that in order for a night watchman employed by Alabama State College to legally carry a pistol, that he must obtain a permit under the provisions of the aforementioned Act of the Legislature.

Quarterly Report of Attorney General, Vol. V, page 85.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Matt A. Boykin,
Judge of Probate,
Mobile, Alabama.

Instrument submitted, held to convey partnership property to individual partners. and as such to be subject to deed tax.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of February 15, in which you request my opinion as follows:

"I enclose herein a carbon copy of an instrument executed on September 10, 1936, by Sol Kahn and Leo Kahn, the original of which instrument was presented to me for record, but I have declined to receive the same for record until I can ascertain whether a payment of a privilege tax is required. I am reliably informed that this instrument was executed merely for the purpose of perfecting the title to the property to which it refers, by defining the respective interests of the parties in lands which they had already acquired, the consideration of the present instrument being nominal; that the property in question was acquired by the two parties to the instrument many years ago, in two parcels; that these parties purchased the property for a factory site as co-partners doing business as Kahn Manufacturing Company, the interest of Solomon Kahn in said co-partnership at that time being three-fourths and the interest of Leo Kahn being one-fourth; that the object of the present instrument is merely to place upon the records of Mobile County some evidence as

to the respective interests which the parties already held in this property; and that it is not the purpose of this instrument to effect the conveyance of anything from either of the parties to the other party, but that it merely confirms in the parties the respective interests which they already actually held in the property.

"I would be obliged if you would render me an opinion advising me as to whether or not the present instrument is exempted from the payment of the privilege tax pursuant to the terms of Schedule 46, Section 348, of the Revenue Act of 1935."

I am of the opinion that the instrument which you enclosed is subject to the deed tax provided in Schedule 46, Section 348 of the Revenue Act of 1935. As I construe it, it is not a statement of the proportion each partner owns in the property as a partnership asset but is a conveyance to the individual partners of their undivided interests.

The status of the property is therefore changed. For instance, in a suit against the partnership only, this property would not be subject to execution. Further, the property is no longer personalty for partnership purposes. These are but two of the changes effected by this instrument.

The purposes of the instrument is to vest an undivided interest in each partner and I am of the opinion that it is not exempt from taxation.

(See Quarterly Reports of the Attorney General, Volume 2 ,page 49, and Hawkins vs. Pure Oil Company, 169 Southern 307. Contrast opinion of this department to Hon. Eugene H. Hawkins, Probate Judge at Birmingham, rendered February 3, 1937).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. S. G. Johnson,
Probate Judge,
Lamar County,
Vernon, Alabama.

Newstands from which magazines and/or periodicals are sold subject to license imposed by Schedule 99, Acts of 1935, page 483.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Schedule 99 has, up to last year, been construed so that unless newspapers and magazines, both, were carried, that there was no newstand, and no license.

"Now they claim that only magazines for sale should be construed as a newstand, and that with only magazines, they should be due and pay a license.

"Will you please advise me in this premise at once."

It is my opinion that a newstand from which magazines and/or periodicals are sold is subject to the privilege license imposed by Schedule 99, Acts of 1935, page 483.

The revenue laws of Alabama as compiled in 1929, Schedule 128, page 290, read as follows: "For each person operating a newstand for the sale of newspapers, magazines, and periodicals, $5.00." (Acts of 1919, p. 282, Section 361, Schedule 75). The Acts of 1935 made a change in the license schedule covering newstands. The 1935 Acts, Schedule 99, provides as follows: "For each person operating a newstand for the sale of magazines and/or periodicals, $5.00."

It is to be observed that the Schedule in the Acts of 1935 does not mention newspapers. It is further to be observed that the sale of magazines and/or periodicals is all that is necessary to come within the provisions of the schedule for 1935. The sale of magazines and periodicals, either or both, is sufficient to invite the imposition of a license for the operation of a newstand.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

License—Auctioneers. Person actually selling at public outcry is party required by Schedule 11 of the 1935 Revenue Act to take out license as auctioneer.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

I wish to acknowledge receipt of your letter of February 27, 1937, which is as follows:

"A firm here is operating an auctioneer business, selling all kinds of livestock for the public and charging a small commission for the service. One person has done all the auctioneering for this firm but he is not a regular auctioneer but an employee of one of the members of the firm. They think that they may want to change auctioneers but do not want to place themselves in position to have to have more than one auctioneer's license.

"Will you please refer to schedule eleven of the Revenue Laws of 1935 and advise whether Probate Judges may issue a license as auctioneers to a firm and whether the firm may change the personnel of the selling end from time to time without taking out an additional license. In other words, when the license as auctioneer is taken out, does such a license permit a firm to do an auctioneer business or is the license just for the particular person doing the selling at the auction sale?"

I am of the opinion that a license to engage in the business of an auctioneer is a personal one and that every person who actually performs the duties of an auctioneer is required to obtain a license. I do not think that a firm can take out a license as an auctioneer and have any number of agents engaging in the said business with only one license.

I refer you to an opinion rendered on November 30, 1935 to the Probate Judge of Clay County, which opinion is reported in Quarterly Report of the Attorney General, Volume I, page 260. This opinion deals with the very question at hand.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. J. H. Huffman,
Chairman, Barber Commission,
Jefferson County, Room 603 Court House,
Birmingham, Alabama.

Barber Commission Jefferson County—No authority to hire attorney.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 11, 1937, in which you request my opinion as follows:

> "Please advise whether or not the Barber Commission of Jefferson County would be entitled to hire an Attorney for advice or to have one act in a special case in carrying out the enforcement of the Barber Law. Does this law in any way prohibit us from getting an Attorney for such purpose?"
>
> "There are occasions when we need legal advice and at the last session the barber act was amended and changed. Since that time we have been in doubt on this particular question. The bill is listed (No. 113 (H. 123—Todd)."

In my opinion the Barber Commission is without authority to employ counsel. The Commission is strictly a creature of the statute and its powers and duties are only those expressly or impliedly set forth in such statute. I am unable to find any words in the statute which might be construed as authorizing such employment of an attorney.

The Act specifically provides that the funds collected by the Commission are public funds. It is well settled that public funds cannot be expended unless there is an express or necessarily implied authority for the expenditure. This was held to be the law in the following cases:

Bice, Co. Treas. v. Foshee, 97 So. 764,

Ensley Motor Car Co. v. O'Rear, 71 So. 704.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. E. H. Hall,
Clerk of Circuit Court,
Henry County,
Abbeville, Alabama.

The claims of officers against the Fine and Forfeiture Fund of a county cannot be made a preferred claim under Section 231, Code of Alabama 1923, as amended by an act approved June 6, 1935 (General Acts 1935, page 162).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 11, 1936, in which you request my opinion as follows:

"No. 110, page 162, General Acts, Regular session 1935. 'To amend Sec. 231 of the Code of Alabama of 1923 listed as preferred claims, items listed in Class 2; compensation of Clerk of the Circuit Court, would under this class /Fine and Forfeiture Claims of a local act' approved August 22, 1919, (Acts 1919, Local pages 72-73) amended in 1927, (Local Acts page 166) be listed as part of my compensation?"

The act to which you refer, that is, the act approved August 13, 1927 (Local Acts 1927, page 166) does not amend Local Act 1919, page 72, but amends Local Acts 1919, page 66, but let this be as it may, I fail to see where these acts, one way or the other could affect the matter you refer to here. You call attention to act of the legislature approved July 6, 1935 (General Acts 1935, page 162) which amends Section 231, Code of Alabama of 1923, which section has to do with preferred claims and the order of payment against the general fund of the county. You desire to know if your claims which are payable out of Fine and Forfeiture Fund of the County could be paid under sub-section 2 of this act which has to do with preferred claims of the second class. My answer is in the negative. Section 231, as amended, supra, has to do with claims which are paid out of the general fund of the county and has nothing to do with claims paid out of Fine and Forfeiture Fund of the county. The Fine and Forfeiture Fund of a county is an independent fund created not by taxation but derived from fines and forfeitures imposed in the county. **Quarterly Report of Attorney General, Vol. II, page 62.** Therefore, any claims that you may have against the Fine and Forfeiture Fund of your county does not come under any provision of Section 231, Code of Alabama of 1923, as amended by the Act of 1927, page 162.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. L. W. Price,
Judge of Probate, Conecuh County,
Evergreen, Alabama.

Officer issuing fishing license entitled to fee of 15c per license in accordance with provisions of Section 42, and subject to the exceptions therein provided.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of March 4, 1937, as follows:

"Please refer to Legislative Act 147, House Bill 272, relating to the catching or killing of fish by reel and rod and requiring the procuring of a license for same, and advise if the issuing officer is entitled to any fee or compensation for issuing the license, and, if so, how much."

I am of the opinion that a designated officer who issues a fishing license is entitled to a fee of 15c for each license issued, subject to the exceptions and provisions of Section 42 of an Act approved August 12, 1935.

The Fishing License Act (Governor's No. 147, approved February 27, 1937) provides that the fishing license "shall be procured in the same manner as is provided in procuring a hunting license and under the same regulations provided therefor." The regulations for issuing licenses are set forth in an Act approved August 12, 1935 and Section 42 of that Act prescribes a fee of 15c per license. This section is an integral part of the "regulations" provided for issuing hunting licenses. Further, it was not the intent of the Legislature to pay 15c for issuing a hunting license and pay nothing for the same service in issuing a fishing license.

I am therefore of the opinion that a fee of 15c per license should be paid in accordance with Section 42, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. S. L. Johnson, Clerk
Circuit Court
Calhoun County
Anniston, Alabama.

Where a convict is paroled by the Governor before he is delivered to State, the cost in such case is payable out of the fine and forefiture fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 9, 1937, in which you request my opinion as follows:

"Your opinion is desired on the following question:

"A defendant in a criminal case is given either a Penitentiary or hard labor sentence and before beginning to serve the same, whether there has been an appeal or not, an indefinite parole is secured from the Governor. will you advise how the costs are to be paid?

"When a defendant is given a sentence of death and is executed, how is the cost paid?"

Certainly the cost cannot be paid by the State under the circumstances you detailed above for the reason Section 3670, Code of Alabama, 1923, provides in part as follows:

"No costs shall be paid, until the convict has been delivered to the penitentiary officials" * * *

Therefore, you will have to collect the cost under Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927. (General Acts 1927, page 45.) This Section provides among other things as follows:

"or in which defendants have been convicted, and have been proved insolvent by the return of executions 'No property found,'" * * *

Answering your second request, I call your attention to Quarterly Report of the Attorney General, Volume IV, page 205.

This opinion answers your request in full.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. H. J. Brogden,
Probate Judge
Covington County
Andalusia, Alabama.

Operator of rolling store required to pay only one State license, but shall pay a county license in each county where he does business. Schedule 146, Acts of 1935, p. 499.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of inquiry as follows:

"Mr. Harry Simon with the State Tax Commission wrote me that he had asked your department for an opinion as to whether or not a rolling store, under the present revenue law, is required to pay a State and County License in each county in which they operate?

"I will thank you to let him have that opinion as soon as convenient to you as I am very much interested in it as I have one or two rolling stores from Butler and Coffee wanting to pay just county license over here and I don't know whether to accept same or not."

It is my opinion that it was the intention of the Legislature to require one state license only for the operation of a rolling store and a county license for each county where the rolling store is operated.

The Legislature wrote the following provisions into Schedule 146 of Section 348, Acts of 1935, page 499:

> "Each person using a motor vehicle doing business as a transient vendor or peddler as defined in this schedule displaying, selling, or offering to sell any goods, wares or merchandise of whatever nature, at retail shall pay to the State in order to engage in such business the following privilege license: (then follows the amount of said license which is based on the number of vehicles operated).
>
> "In addition to the above there is levied a license for each county in which said business is conducted of fifty percent of the amounts levied as a state license: (Then follows some definitions as to what shall constitute vendors or peddlers under the schedule)."

The general provisions of the 1935 Acts of Alabama, page 557, with particular reference to Section 350 thereof appearing on the same page, provide that: (a) "Whenever a license is levied in this Act there shall be collected both a state and county license for each place of business, except as specifically otherwise provided; (b) "there is also hereby levied for the use of each county in the State a license as privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax except as otherwise herein provided." It is to be noted that provision (a) of said section 350 refers to a business conducted at a fixed location and has no reference to peddlers or similar businesses.

The provision (a) can have no application to a rolling store, because this office in a ruling to the Hon. Frank M. Johnson, Probate Judge, Double Springs, Alabama, December 3rd, 1935 (A. G. Quarterly Report, Volume I, page 279) held that a rolling store has no fixed place of business and that a license would not be issuable to authorize a rolling store to sell products which are required to be sold at a fixed location.

The provision (b) does have application to the subject of the license in question, but this provision is substantially duplicated in said schedule 146, supra. Thus we find there is double expression to the requirement that a rolling store take out a county license in each county where the business is conducted.

Although there are two separate provisions requiring separate county license, there is no provision anywhere in the Act so far as we are able to ascertain which requires or specifically provides that the rolling store shall have a state license for each county where it does business, or which requires more than one state license.

The Legislature clearly has a right to establish the units of classifications respecting the territory to be covered by the license, and it may make the state a unit or it may make the counties and cities separate units and require that a state license be paid for each unit. The Legislature may reduce the unit for state license to territory less than the area of the state, but in the absence of special provision making such reduction, it is my opinion that the

unit of classification for state license is co-extensive with the area of the state. Citing: Patterson v. State, 79 So. page 157; Peoples Auto Company v. State, 121 So. pages 907 and 908.

In making specific provisions for additional county license and the failure of the Legislature to make such provision with reference to state license, being charged at the time with knowledge of the law in the cases of Patterson v. State and Peoples Auto Company v. State, supra, the Legislature evidenced an intention, namely, that the state license for the rolling store should be co-extensive with the area of the state and that the county license for such operation should be limited to the county where taken out.

It is, therefore, my conclusion and I so hold that the operator of a rolling store is required to take out only one state license and the one state license shall entitle him to do business in any county of the state where he has paid a county license.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. J. R. White,
Chairman, Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—Where debts outstanding as of October 1, 1935 were paid in part by temporary loan and the balance by funds drawn from the County general fund, refunding warrants may now be issued under provisions of an Act approved April 21, 1936, (General Acts of 1936, page 217, compantion law to County Financial Control Act), to refund only the temporary loan.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your letter of inquiry as follows:

"I would like to have your opinion as to whether or not Walker County may issue and sell interest bearing warrants under any provisions of the County Financial Control Act under the following circumstances and for the following purposes:

"On October 1, 1935, there were outstanding obligations against the general fund of the county of $29,892.88. This was made up of various accounts payable in the sum of $24,142.88, and of amounts pledged and due by the County to the Walker County Library Board in the sum of $5750.00. Twelve Thousand ($12,000.00) Dollars of these accounts was paid by the County Board borrowing that sum of money from a local bank and issuing interest bearing warrants. The balance of these accounts and the amount due to the Walker County Library Board were paid out of the general fund of the County.

"It has now developed that the county exhausted too much of its funds in paying these obligations and that instead of paying them the

county should have issued interest bearing warrants. Unless long term interest bearing warrants can now be issued to replace the money that was used in the payment of the accounts and obligations described above, then the county will be seriously handicapped in working out its budget for the coming year and will, in all probability, be unable to meet some of its obligations for the necessary current governmental operating expenses.

"I would like to be advised as to whether or not Walker County may issue interest bearing warrants running over a period of twenty years if deemed advisable in the sum of approximately $29,982.88, and sell the same, the proceeds thereof to be placed in the general fund of the county to retire the $12,000.00 short term warrant and to take the place of the money that was used to pay the obligations of the county mentioned above."

It is my opinion that you are authorized by an Act approved April 21, 1936, No. 181 (General Acts of 1936, page 217), to issue refunding warrants in the sum of $12,000.00, the proceeds of which are to be used in paying the temporary loan of $12,000.00 made by your County to liquidate a portion of a debt existing on October 1, 1935, as stated in your request.

This conclusion harmonizes with an opinion rendered by this office on July 7, 1936, to you (Volume IV, Quarterly Report of the Attorney General, page 12), and with an opinion rendered to the Judge of Probate of Hale County on February 8, 1936 (Quarterly Report of the Attorney General, Volume II, page 138), in which it was held "The fact that a temporary loan has been secured to take care of this (an) obligation merely changes the form of the obligation and does not prevent it being a general obligation." Instead of issuing refunding warrants you elected to procure a temporary loan. The effect of your election was only to change the form of the obligation.

With reference to the balance of the debt which you say was paid from the general fund of your County, it is my opinion that you are not authorized under this Act to issue refunding warrants to take the place of money you used in discharging the debt. This debt no longer exists in any form, but has been paid and discharged. It is true the money to pay off the debt was obtained from the general fund of your County and that your election to pay the debt in the manner you state will lead to some embarrassment, but regardless of this situation there is no way to escape the conclusion that the debt has been paid and no longer exists in the old or in the changed form. Your County cannot, of course, owe a debt to itself.

The Emergency provisions of the County Financial Control Act (General Acts of 1935, page 803) has no application to the instant inquiry, because, in my opinion, it deals only with situations over which the County governing body has no control. The facts as stated in your letter do not present an emergency contemplated by this Act, nor does this Act under any phase, authorize refunding warrants for the balance paid from the general funds of the County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 16, 1937

Hon. Watkins M. Vaughan,
Probate Judge,
Dallas County,
Selma, Alabama.

Corporations or associations organized under the provisions of Act No. 220, House Bill 275, approved July 17, 1935, are not required to pay franchise tax nor recording fees.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"Please advise what fees I shall collect from the incorporators of a company to be organized under Acts of 1935, page 604 et seq. Section 15 (p. 610) provides that such corporation shall pay the State an annual permit fee of $10.00 and shall not be liable for any other license or privilege fee or tax for the purpose of engaging in business.

"Under Sec. 6969 of the Code a corporation is required to pay $1.00 for each thousand dollars of proposed capital, etc., and also such corporations are required to pay the Secretary of State and Probate Judge the ordinary fees and recording fee.

"Does the 1935 Act take these co-operative farmers associations out of the operation of the general laws as to collection of fees and tax on capital?"

In my opinion, Section 15 of Act No. 220, House Bill 275, approved July 17, 1935, specifically exempts corporations or associations organized under the terms of said Act, supra, from the payment of franchise taxes or ordinary recording fees and the like. Section 15 is as follows:

"Any corporation or association organized hereunder shall pay to the State the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the State of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members, and all goods and articles purchased or acquired by such corporation, whether in or out of the State, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this State, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this State."

In my judgment, the above provision is the sole authority for the collection of taxes and fees from a corporation or association organized under the terms of said act except as provided in Section 19 thereof.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937

Hon. N. P. Tompkins,
Judge of Probate Court,
Colbert County,
Tuscumbia, Alabama.

Application to redeem land on installment plan and without interest or penalties as provided by Section 291, as amended, of an Act "An Act to provide for the general revenue of the State of Alabama," approved March 26, 1936, page 207, should be filed with the Probate Judge before January 1, 1937. Probate Judge should not accept application after December 31, 1936, for redemption on the installment plan.

Under Section 291 of Act Number 194, 1935 Acts as amended by Act Number 49, 1936 Acts, page 49, Probate Judge may accept application on and after January 1, 1937 for redemption of land sold to the State, but the redemption shall be governed by Section 268-290, Revenue Act, 1935.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of the 10th, from which I quote as follows:

"General Acts of 1935, page 377, Section 291, as amended by General Acts of 1936, pages 27 and 28, provide that persons desiring to redeem under provisions of the four year law, shall before January 1, 1937, make application to redeem, etc.

"Please advise if above provision means that persons having four years to redeem under above act, cannot redeem unless application to redeem is filed prior to January 1, 1937, and should I as Probate Judge permit redemption by such persons if they fail to file application to redeem prior to January 1, 1937."

It is my opinion that application to redeem land on the four- year installment plan and without interest or penalties as authorized by an Act to to amend Section 291 of an Act entitled "An Act to provide for the General Revenue of the State of Alabama," approved March 26, 1936, appearing on page 27 of the 1936 Acts of Alabama, should be filed with the Probate Judge before January 1, 1937. It is further my opinion that the Probate Judge should not accept the application if filed later than December 31, 1936, nor should he permit redemption of the land on the installment plan as provided by said Act.

It is further my opinion that applications filed after December 31, 1936 should be governed by the rules and regulations for redemption which are provided for under the provisions of Sections 268-290 of the Revenue Act of 1935.

The Act referred to in the preceding paragraph makes the following provision: "Whenever any real estate has, prior to January 1, 1931, been sold for taxes and bid in by the State at tax sale, **the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions may apply."**

The Act then proceeds with the additional provisions which I quote as follows:

"All persons having the right to redeem, shall have four years from the date of sale to redeem and such redemption shall be made as in other cases except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties. Any person having the right to redeem any property sold to the State for taxes and who desires to redeem under the provisions hereof, shall, before January 1, 1937, make applications to the Probate Judge of the County where the real estate is situated, the same to be approved by the State Land Commissioner, and shall deposit with the Probate Judge a sum equal to not less than one-fourth of accrued taxes, without interest or penalties, and annually thereafter shall pay not less than one-fourth of said sum to the Probate Judge."

It is apparent that it was the intention and purpose of the Legislature to offer bargain days for the redemption of lands sold to the State prior to January 1, 1935 and the bargains to be offered on those days was redemption on an installment plan without penalty or interest. It is further evidence that it was the intention of the Legislature to set and fix a time limit when these bargains should expire, and that it fixed the time limit as December 31, 1936, after which time the Probate Judge is not authorized to receive applications for installment redemption. The Legislature specifically stated that all real estate sold to the State prior to January 1, 1935, should be redeemed in the same manner as provided for sales after January 1, 1935, unless an application to redeem on the installment plan and as authorized by the Act, is filed with the Probate Judge is not barred after January 1, 1937, from accepting applications for redemption of lands sold to the State in the manner provided for redemption from sales made after January 1, 1935, but he is prohibited from accepting applications to redeem on the installment plan without interest or penalties.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937

Hon. Chas. W. Lee,
Sate Comptroller,
CAPITOL.

Costs—Justice of the Peace—Not entitled to continuance fee on warrant of arrest returnable instanter.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

You request an opinion on a state of facts as follows:

"An opinion from your office is respectfully requested regarding continuance fee taxed by a certain Justice of the Peace in Shelby County in all cases for which he issues the warrant, in other words, this Justice of the Peace issues warrant returnable instanter at his office. When de-

fendant is apprehended he appears before Justice of the Peace and the Justice of the Peace sets date of trial. For this procedure the Justice of the Peace claims one continuance fee, twenty-five cents."

It is my opinion that a Justice of the Peace who issues a warrant returnable instanter and upon appearance of the defendant thereupon continues the case to a day certain is not entitled to a fee for a continuance.

Under such a state of facts, there was no continuance of a case which had been set down for trial, but merely the fixation of a date for trial. A continuance fee under the law is allowed only for the continuance of the trial and not for the fixation of a day certain for trial.

If at the time the prisoner is brought before the Justice of the Peace, witnesses have been summoned and other preliminaries necessary for trial have been made, and it then develops that the cause cannot be tried on that particular day, the Justice of the Peace would be entitled to the fee for a continuance. Sec. 3753, Code of Alabama, 1923. Under such circumstances a trial day had actually been fixed. The mere appearance of the defendant before the Justice of the Peace without more and the fixation at that time of a day certain for trial is not such a continuance for which the Justice of the Peace is entitled to pay.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Judge of the County Court who unlawfully suspends sentence to hard labor for fine and costs is not responsible for uncollected costs.

Judge of County Court on entry of nol: pros; has no authority to tax costs against the defendant.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your inquiry as follows:

"Listed on County Court Docket of a certain County is a case of the State vs. Defendant on a charge of abusive language.

"After one continuance, the case was tried on April 1, 1935, and the defendant found guilty and punishment fixed as follows:

" 'A fine of $5.00 and the cost of this proceeding $21.10 including court cost and officers cost.'

"The cost of the case, including fine as entered on the fee book totals $36.10 as follows:

Fine	$ 5.00
Court fee	5.00
Clerk Fee	4.05
Sheriff Fee	6.00
Solicitor Fee	10.00
Justice	.75
Witnesses	5.30
	$36.10

"The defendant having failed to pay the fine and cost, he was sentenced to hard labor for 10 days to pay the fine and 41 days for the cost.

"The following order is entered on the docket, signed by the County Court Judge:

" 'Sentence is hereby suspended and the defendant is placed on probation on good behavior and on his agreement to pay $1.00 a week until the cost of $21.10 is paid, the cause is continued.'

"It will, therefore, be seen that the Judge of the County Court has waived the fine of $5.00 and the Solicitor's fee of $10.00.

"Please refer to an opinion of the Attorney General—1932-34, page 265—and advise:

"1. Has the Judge of the County Court the authority to void the statutory charge of the Solicitor's fee (Sec. 3738 1923 Code) applying in this case?

"2. If the answer to the above is negative, should this amount be charged against the Judge of Probate as ex-officio Judge of the County Court?

"In the above case the defendant has paid to the clerk the sum of $13.30

"It is also noted that in numerous instances the County Court Judge has nolle prossed cases on the payment of clerk and sheriff fees only.

"If a nolle pross is entered should **any** cost be taxed against the defendant?

"If so, should not such cost include court fee and solicitor fee (County Court?)

"If these fees should be included and are omitted who would be responsible for such omission?"

It is my opinion that the judge of a county court is without lawful authority to suspend judgment and sentence of a defendant on a misdemeanor charge. The Act of the Legislature authorizing such suspension was held unconstitutional in the case of Montgomery v. State, 163 So., 365.

The act of the Judge in suspending a sentence contrary to law is not such an abuse of an official duty as will impress any liability on his official bond for uncollected costs. The order of suspension is absolutely void.

The judgment of the court against the defendant for payment of the fine and costs is not extinguished nor is it satisfied by suspension of the sentence.

There is no authority of law which permits the judge of a county court to enter nol. pros. in a case on condition that the defendant pays the costs. Any attempt of the court to impress a condition of this nature is absolutely void and without authority. Opinion of the Attorney General, Book IV, page 79.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937

Hon. Q. D. Taylor, Sheriff,
Marshall County
Guntersville, Alabama.

1. The Chief Deputy Sheriff of Marshall County is appointed by the Sheriff and serves at his will, therefore, such Chief Deputy has no fixed term of office and his salary may be reduced or increased within the limits fixed by Section 10188, Code of Alabama, 1923.

2. The jail guard of the County of Marshall is also appointed by the Sheriff and serves at his will, therefore, has no fixed term of office and his salary may be reduced or increased at any time the Board of Revenue of his county may see fit.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 23, 1936 in which you request my opinion as follows:

"I hand you herewith a certificate signed by the Chairman of the Board of Revenue which correctly states the facts as shown from Minutes of the Board of Revenue.

"I appointed Mr. E. M. Boyles Chief Deputy Sheriff of this County at a salary of $125.00 per month. At that time the County was paying and had been since 1927, a monthly salary to the Chief Deputy of $125.00 per month. No change had been made decreasing this amount. I appointed him for a four-year term to the duration of my tenure in office. They continued to pay this salary until the first day of November, 1935 at which time the Board of Revenue created by Special Act of the Legislature of 1935 in fixing the Budget for the County allowed in the Budget only $75.00 and by this means attempted to cut his salary from $125.00 to $75.00 per month. Special Acts of the Legislature, 1936 created a new Board of Revenue. The new Board of Revenue restored by resolution his salary to $125.00 per month, which they have been paying from May 1st, and did by Minute Entry agree to pay back salaries in case they could legally do so.

"QUESTION: Can this back salary of six months be legally paid to Mr. Boyles under this state of facts set forth in this Certificate of the Chairman of the Board of Revenue?

"For your further information, I talked to the Chairman of the Board of Revenue, Judge Williams, Probate Judge of Marshall County, and he told me to appoint Mr. Boyles at a salary of $125.00 per month and I did so under that agreement at that time, and he was paid for nine months of his salary at that rate before they attempted to cut it. In that same conversation I had an agreement with the Probate Judge, who is Chairman of the Board of Revenue now and was then, that the salary of the Jail Guard would be $75.00 per month, for the term of my office, and I appointed Mr. W. P. King, Jailor.

"The Minutes of the Board of Revenue record this part of the agreement, as shown by the enclosed Certificate from the Chairman. He was paid the $75.00 per month until November 1st, when the Board of Revenue in fixing a Budget under the Lee bill allowed in the Budget only $50.00 per month for his services. He was then paid $50.00 per month until May 1st, when his salary was then restored to him under the agreement shown by the Minutes that if they could legally do so they would pay the back six months' of $25.00 per month.

"All payments made to Mr. Boyles and Mr. King were accepted under protest and claims filed with the Board of Revenue each month for the full amount of their original salaries, and they were accepted under an agreement with the Board of Revenue and Mr. King and Mr. Boyles, that it was to be accepted without prejudice on their part and without prejudice on the part of the Board of Revenue.

"QUESTION: Can these payments now be legally made to Mr. King for the back six months, in which he was only paid $50.00 per month instead of $75.00 as claimed to be due by him?"

Answering your request, I call your attention to Section 10188, Code of Alabama, 1923, which is as follows:

"1088. DEPUTIES.--In all counties of the State of Alabama which now have not more than two hundred thousand inhabitants according to the last federal census or which may hereafter have such population according to any federal census hereafter taken, in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than nine hundred and not more than fifteen hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county."

You will note from the above section that power to fix the salary of such chief deputy is lodged in the commissioner's court, Board of Revenue, or other like governing body of your county. While the power of appointment of such deputy is lodged in the sheriff and the statute supra says: "Such deputy serves at the will of the sheriff." This being true such deputy has no fixed term of office. **Touart vs. State ex rel, Callaghan,** 173 Ala. 453;**Cooper**

vs. State ex rel, Hawkins, 226 Ala. 288; **Roberts vs. State ex rel, Bailey et al.** 228 Ala. 222; 99 A. L. R. Page 381. (Note.)

I note you say you appointed Mr. Boyles Chief Deputy for a term of four years and at the time the Board of Revenue of your County, fixed his salary at $125.00 per month and he was paid this amount up to November 1, 1935 at which time the Board of Revenue reduced his salary fixing it at $75.00 per month; that this deputy drew this salary up to May 1, 1936, at which time the Board of Revenue placed his salary back to $125.00 and offered to pay the difference between $125.00 per month and $75.00 per month from November 1, 1935 up to May 1, 1936.

You desire to know if this can be legally paid: my answer is in the negative. Even though you appointed such deputy at the beginning of your term for a term of four years could make no difference as he still served at your will and pleasure. I call your attention to 46 C. J. Page 964, Section 98, which is as follows:

> "98. INDEFINITE TENURE. Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no "Term" of office. A constitutional provision that terms of office not fixed by the constitution shall not exceed a specified time does not enlarge the duration of an office held at the pleasure of the executive."

Therefore, such deputy having no fixed term of office, but serving at the will of the sheriff was subject to the cut made by the Board of Revenue who was clothed with power to fix his salary between certain limits, Section 10188 supra, but aside from all this, I think Section 68 of the Constitution of Alabama, 1901 definitely prohibits the very thing attempted to be done in this case. This section is as follows:

> "The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employe, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners."

What I have said with reference to your chief deputy sheriff applies with equal force to your jail guard, Mr. W. P. King.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. W. F. Kitchens,
Judge of the City Court,
Jasper, Alabama.

Employees of a logging camp who are riding on semi-trailer are not subject to subsection (c) of Section 85, Highway Rules, which relates only to trailers.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of November 21, 1936, in which you request my opinion as follows:

"The Cleveland Lumber Company operates a saw mill in Jasper. It owns timber located several miles out of Jasper. To get to this timber and back its trucks travel the public highway. The method of operation is for timber cutters to go in the woods, cut down the trees, cut off the logs, and these logs are brought to the mill in Jasper on trucks. To these trucks are attached trailers. The logs are loaded on the trucks and rest on the trailers, are fastened with chains, and the trucks so loaded are driven over the highway to the mill.

"The timber cutters live in Jasper and the Lumber Company permits them to assemble and ride on the trucks to their work in the woods. When the day's work is over the last loaded truck to come in is permitted to wait and the timber cutters allowed to get on these logs so loaded on the truck and come back to town where they live.

"There is no charge for them going out to their work, and no charge for them coming back on the truck.

"The contract of employment does not require the company to carry them to their work nor to bring them back. They simply ride said truck as employees permitted to do so.

"Under the above state of facts would a driver of one of said lumber trucks along the highway, where said employees are so riding on said truck, be guilty of a violation of subsection "C" of Section 85 of the Rules of the Highway Code?

"Would an employee permitted to ride under such circumstances be a passenger within the meaning of said subsection 'c'?"

The facts stated in your request are that the men ride either on the truck or a semi-trailer. You asked if this is a violation of subsection (c), Section 85 of the Rules of the Highway Code. This cited section relates only to trailers and as, under the facts stated, the men are not riding on trailers, this section would not apply.

The Legislature has made a distinction between trailers and semi-trailers. I refer you to an opinion of this office dated May 13, 1936, addressed to the Hon. J. Lee Smith, Probate Judge of Chilton County, Quarterly Report Vol. III, page 124 for statement in reference to this matter.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. M. W. Forman,
Judge of Probate
Ashville, Alabama

The county is not responsible for the premium on the bond of the chief clerk in the probate office.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1937, in which you request my opinion as follows:

"Please give me your opinion as to the county paying the premium on the Probate Judge Chief Clerk's bond, when so ordered by the Court of County Commissioners."

My answer to the above is in the negative. The Act of Legislature approved April 20, 1933 (General Acts of Alabama, 1933, page 203), which act has to do with and regulates the making of bonds of county officials and employees, does not make a provision for nor include the Chief Clerk of the Probate Court. So we look next to the statute creating the office of chief clerk of the probate court. I call your attention to Section 9591, Code of Alabama, 1923. This section is dealing with the authority of the Judge of Probate and it says among other things:

"The judge of probate has authority—To employ, at his own expense a chief clerk such other clerks as he deems necessary, whose official acts he is responsible for."

You will note from the above that the Judge of Probate is held responsible for the official acts of such clerk. I call your attention to Section 9593 of the Code of Alabama, 1923, which is as follows:

"OATH AND BOND OF CHIEF CLERK.— Such chief clerk, before he enters upon his duties, must take the oath directed to be taken by the officers of this state, and give bond with surety, payable to the judge of probate in such sum as he may prescribe, upon which bond such clerk shall be liable to such judge in consequence of any act of misfeasance or malfeasance of such chief clerk in the duties of his office; which bond must be approved by the judge of probate, and filed and recorded in the office of the clerk of the circuit court of the county."

So it is apparent that the bond of the chief clerk in the office of the Judge of Probate is not made for the protection of the county or any of its funds, as the Probate Judge's bond does this, but is made to the Judge of Probate for his protection. Neither the state nor county have any interest in this bond, therefore, the county cannot be made responsible for the premium on such bond.

I am herewith enclosing a copy of an opinion rendered on January 25, 1935 to the Probate Judge of Hale County, wherein the same conclusion is reached.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1937.

Hon. G. E. Alday, Sheriff
Washington County.
Chatom, Alabama

Where a defendant is charged with one or more separate and distinct offenses and a separate and distinct warrant is issued on each offense, the sheriff is entitled to his fee of arrest from the fine and forfeiture fund, in each case where the defendant is acquitted, the State enters a nolle proseque or the prosecution is abated by the death of the defendant.

Second—The Sheriff would not be entitled to his guard or jail fee against the fine and forfeiture fund of the county in a case where the warrant is based on an affidavit and the defendant is discharged or acquitted by the County Court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 20, 1937 in which you request my opinion as follows:

"When a defendant is arrested on two warrants, on the same date and placed under bond for his appearance in court on two separate charges, will the sheriff be entitled to receive fees for two arrests, if case was dismissed or defendant discharged by court, if so, would this be a legal charge against the fine and forfeiture fund?

"On warrant and affidavit issued by the Clerk of County Court and defendant arrested and committed to jail, after trial defendant is discharged by the County Court would a guard or jail fee be a legal charge against the fine and forfeiture fund. This has reference to a warrant and affidavit from County Court?"

My answer to your first request is in the affirmative. I call your attention to Section 3741, Code of Alabama, 1923 where it says "For executing warrant of arrest in misdemeanor cases $2.00." I call your attention to Section 3741, Code of Alabama, 1923 where it says, "For executing warrant of arrest in felony case $$4.00."

The law fixes these amounts and it does not matter whether you have one, two or more warrants of arrest against an individual charging separate and distinct offenses, you would be entitled to your arresting fee in each and every case.

My answer to your second inquiry is in the negative. I call attention to the case of **Kilgore v. Swindle, 219 Ala. 378 (122 So. 333.)** Here the Supreme Court deals with this precise question and holds that under Section 3741 supra, this fee does not attach in misdemeanor cases based on affidavit where no conviction is had.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 19, 1937.

Hon. E. A. Hammett,
Judge of Probate,
Talladega, Alabama.

Tax deed—Probate Judge has no authority to issue tax deed to heirs of purchaser at tax sale, unless the certificate of purchase is surrendered or it is reestablished in the manner provided by law.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your letter of inquiry from which I quote as follows:

"I have had this question arise: Forty acres of land were sold for taxes in the year 1921. The land has never been redeemed. The purchaser at the tax sale died several months ago. His heirs or devisees now ask that I execute to them a tax deed. They do not have the certificate issued by the Tax Collector to the purchaser at the Tax sale.

"As I understand the law, the purchaser is required to surrender the certificate of purchase at the time he requests a deed.

"Please advise me whether I should execute a deed, or what course should be followed by me."

It is my opinion that you are not authorized to execute and deliver a tax deed to the heirs of the purchaser of land at a tax sale, unless the certificate of purchase is surrendered to you. You are authorized to make a deed only upon surrender of the certificate of purchase. Section 241, 1935 Acts of Alabama, page 360, reads as follows:

"After expiration of three years from the date of the sale of any real estate for taxes, the Judge of Probate then in office must execute and deliver to the purchaser, other than the State, or person to whom the certificate of purchase has been assigned **upon return of the certificate** and payment of a fee of $1.00 to the Judge of Probate, a deed to each lot or parcel of real estate sold to the purchaser, etc."

This statute should be strictly construed. I might state parenthetically that the deed may be delivered at the expiration of two years where the sale was made before April 19, 1933. Quarterly Report, Attorney General, Volume 2, page 107.

I think you should require a surrender of the certificate before making the deed for the reason that you have no definite assurance that the certificate of purchase was not transferred by the original purchaser. If the certificate of purchase has been established in a procedure of Court which would be lawfully binding on you, then in that instance you could probably act, but until proper procedure has been taken, I can only advise you to insist upon surrender of the certificate of purchase before you make a tax deed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 20, 1937.

Mrs. Bessie R. England,
Custodian of Perry County School Funds,
Marion, Alabama.

Education—Custodian of County School Funds is entitled to reasonable pay for services rendered. County Board of Education may pay Custodian out of Minimum Program Fund.

Opinion by Assistant Attorney General Simmons.

Dear Madam:

Reference is made to your letter which I quote as follows:

"Recently the Perry County Board of Education appointed me Custodian of School Funds of Perry County with an increase in salary of $25.00 per month. Out of what funds is the salary of Custodian of School Funds to be paid. It might be well for you to know that as Assistant to the Superintendent I was being paid the sum of $70 per month, and upon being appointed Custodian the salary was raised. Now under the new Superintendent's administration, should he see fit to discontinue the service of an office assistant could he pay me for service rendered as Custodian, and if so out of what fund could the salary be paid."

This office has heretofore ruled on October 28, 1936, in an opinion addressed Hon. J. G. Pinson, Rockford, Alabama. (Quarterly Report of the Attorney General, Vol. V. page 63) that the School Depository may be paid out of the Minimum Program Fund for clerical assistance in handling school funds.

Adopting the reasons assigned in that opinion for such payment, it is my opinion that the County Board of Education of your County is authorized to pay you a reasonable salary for the services you have rendered. Your service as Custodian of the School Funds is, in my judgment, an aid in providing a minimum term for schools in your County and also is an assistance in the promotion of equalization of educational opportunity for all children in the schools of your County and comes within the purview of Section 2 of Act No. 295, H. B. 852 approved September 2, 1935 (General Acts of 1935, p. 714).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 20, 1937.

Hon. J. A. Simpson,
State Senator,
Jefferson County
Birmingham, Alabama.

Licenses—Automobile dealers having licenses under Schedule 12 of Section 348 of Revenue Act of 1935, not exempt from license required

by Schedule 147 if engaged in selling automobile accessories and/or parts by truck to other dealers over state.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 30, 1936, which is as follows:

"The Tax Commission is demanding that dealers in Ford parts over the state who are also dealers in Ford cars and products of all kinds and who pay the license provided for in Schedule 12 of the Revenue Act of 1935 (Simon's Code page 222) also pay a transient dealer's license under Schedule 147 of the same Revenue Act (Simon's Code page 290).

As we read and interpret Schedule 12 and as the Supreme Court held against us in the case of **Henry vs. McCormack Motor Car Company, 167 Sou. 256,** we do not believe these dealers are liable for this double tax.

"The Supreme Court said that the words "automobile accessories" didn't mean automobile and accessories but meant only accessories. We must contend that the words have some meaning and the Tax Commission is now contending that they don't mean either automobile or accessories. It would be very much appreciated if you would give us your opinion as to whether or not dealers who send trucks around over the state from which they sell at wholesale automobile parts to other dealers and who pay the license required under Schedule 12 are also liable for licenses required under Schedule 147 and very greatly oblige."

I am of the opinion that your inquiry should be answered in the affirmative.

The question presented by your inquiry is whether or not the exemption provision in Schedule 12 would exempt an automobile dealer from the payment of the license required by Schedule 147, if the concern otherwise is liable for the license as a "transient dealer" under Schedule 147.

The exemption provision in question of Schedule 12 is as follows:

"Provided that upon payment of the license according to the foregoing schedule, a dealer in automobiles may do a general automobile and automotive business and not be required to pay any further or additional state and county licenses to handle or sell automobile accessories and parts, radios, tires and batteries, or for the operation of a garage for storage where a charge is made, or for the repair of painting of motor vehicle or trucks. * * * *"

In construing the above quoted exemption provision, this office has held that same did not prevent the collection of licenses for each established place of business. **Quarterly Report Vol. 1 p. 26.** Our Supreme Court held that this exemption provision did not exclude the collection of both a State and County License. **Henry v. McCormack Bros. Motor Car Company** 232 Ala. 196, 167 So. 256.

The purpose of the exemption provision in question was to allow an automobile dealer who had taken out a license under Schedule 12 to handle or sell automobile accessories, batteries, tires, etc. at the established place of business to which the license under Schedule 12 was applicable with-

out additional licenses (Schedule 16 for example). It does not, in my opinion, authorize such dealer to do a transient dealer's business by selling the products, even at wholesale, off trucks throughout the state without having licenses for same under Schedule 147.

The purpose of Schedule 147 is to require a license of those businesses therein enumerated doing a transient business regardless of an established place of business. There are certain exemptions contained in said Schedule, but same are not applicable to the instant case. If an automobile dealer is liable for a license for each established place of business, then such dealer would be liable for a transient dealer's license if he comes within the provisions of Schedule 147. Exemptions are strictly construed against the person claiming the exemption.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 23, 1937

Hon. William O. Baldwin
Chairman, Alabama Alcoholic
Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. Alcoholic beverages sold by licensed clubs, restaurants and hotels cannot be sold for other than "on-premise consumption."

2. A guest, patron or member of a licensed hotel, restaurant or club cannot carry alcoholic beverages bought from such hotel, restaurant or club off the premises, either sealed or after the same have been opened, since alcoholic beverages so sold are for consumption on the premises **only.**

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 18, 1937, which follows:

"I am writing you at this time to ask that you please interpret for this Board Section 11, Sub-sections a and c, pages 19 and 21 of the Alabama Beverage Control Act. Under Section 11, Sub-section a—Authority To Issue Liquor Licenses to Hotels, Restaurants and Clubs, and Section 11, Sub-Section a, Issuance of Hotel, Restaurant and Club Liquor Licenses, the law specifically states that the Board has authority to issue a liquor license to a hotel, restaurant or club to purchase liquor from State Stores for sale to guests, patrons, or members for consumption on the premises of such hotel, restaurant or club.

"Question 1. Under this Section of the Alabama Beverage Control Act, can any alcoholic beverages be sold by a club, restaurant or hotel for other than on-premise consumption?

"Question 2. Can a guest, patron, or member of a hotel, restaurant or club, purchase alcoholic beverages from said hotel, restaurant or club in a sealed container and carry same off of the premises, either sealed or after having been opened?

"The law seems to be very clear that alcoholic beverages sold by liquor licensees licensed by the Board must be sold only in sealed containers for on-premise consumption. It is very important that this question be answered by your office before this Board places an order for alcoholic beverages to be sold and distributed to liquor licensees in that if liquor licensees are confined in their sales to consumers for on-premise consumption, we must order miniatures.

"Therefore, I would appreciate an opinion interpreting the hereinabove section of the law immediately."

A full and complete answer to your inquiry will necessitate a consideration of other sections of the Alabama Beverage Control Act as well as Subsections (a) and (c) of Section 11 of said Act, the sub-sections mentioned in your letter of inquiry.

The pertinent sections and sub-sections of the Alabama Beverage Control Act will here be set out in the order in which they appear in said Act.

Sub-section (a) of Section 11 reads as follows:

"Authority to Issue Liquor Licenses to Hotels, Restaurants and Clubs —Subject to the provisions of this Act, and regulations promulgated under this Act, the Board, with the approval of the City Commissioners or other governing authority, if the hotel, restaurant or club be located in a municipality, or with the approval of the Board of Revenue and Road Commissioners or other governing authority, if the hotel, restaurant or club be located in the county and outside the limits of the municipality, shall have authority to issue a liquor license for any premises kept or operated by a hotel, restaurant or club and specified in the license, entitling the hotel, restaurant or club to purchase liquor from an Alabama Liquor Store and to keep on the premises such liquor and, subject to the provisions of this Act and the regulations made thereunder, **to sell the same and also vinous, malt or brewed beverages to guests, patrons, or members for consumption on the hotel, restaurant or club premises.** Such licensees shall be permitted to sell malt or brewed beverages as defined in this Act and wines of alcoholic content not in excess of twenty-four (24%) per cent by volume, for **consumption on the premieses.** Such licenses shall be known as hotel liquor licenses, restaurant liquor licenses, and club liquor licenses, respectively." (Emphasis ours).

Sub-section (c) of Section 11 reads as follows:

"Issuance of Hotel, Restaurant and Club Liquor Licenses. Upon receipt of the application, the proper fees, the certificate of approval of the governing authority, and upon being satisfied of the truth of the statements in the application, and that the applicant is a person of good repute and seeks a license for a hotel, restaurant or club as defined in this Act, the Board shall grant and issue the applicant a liquor license entitling him to purchase liquor from an Alabama Liquor Store, and **in that part of the hotel, restaurant or club, set out in the license, to sell liquors as**

herein defined in original unbroken packages or containers as purchased from Alabama Liquor Stores and also vinous and malt or brewed beverages to the patrons, guests, or members for consumption in that part of the hotel or restaurant habitually used for the serving of meals to patrons, guests or members, or in private rooms of the building, as hereinafter provided, and in accordance with the provisions of this Act and the regulations made thereunder." (Emphasis ours).

Section 16 reads, in part, as follows:

"Sales of Liquor by Licensees:—Every hotel, restaurant or club licensee **may sell liquors as herein defined in original unbroken packages or containers as purchased from Alabama Liquor Stores for consumption only in that part of the club, hotel or restaurant habitually used for serving of food to guests or patrons, and, in the case of hotels and clubs, to guests or members in their private rooms in the hotel or club.** In the case of a restaurant located in a hotel, which is not operated by the owner of the hotel and which is licensed to sell liquor under this Act, **liquor may be sold for consumption in that part of the restaurant habitually used for the serving of meals to patrons, and also to guests in private guest rooms in the hotel."** (Emphasis ours).

Section 17 reads as follows:

"Sale of Malt or Brewed Beverages—Every license issued to a hotel, restaurant, club or railroad pullman or steamship company under this Act for the sale of liquor, **shall authorize the licensee to sell vinous and malt or brewed beverages at the same places, but subject to the same restrictions and penalties as apply to sales of liquor, except that licensees may sell vinous, malt or brewed beverages, as herein defined, for consumption on the premises where sold** in the manner hereinafter set forth." (Emphasis ours).

In view of the plain, clear, and unambiguous wording of the above quoted portions of the Alabama Beverage Control Act, and especially in view of the use of the word **"only"** in Section 16, supra, I am of the opinion that:

1. Alcoholic beverages sold by licensed clubs, restaurants and hotels cannot be sold for other than "on-premise consumption".

2. A guest, patron or member of a hotel, restaurant or club cannot carry alcoholic beverages bought from such hotel, restaurant or club off the premises, either sealed or after the same have been opened, since alcoholic beverages, so sold, are for consumption on the premises **only.**

In my opinion, such conclusions are inescapable.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 25, 1937

Hon. W. L. Pratt
Judge of Probate Court
Bibb County
Centreville, Alabama.

(1) County Commissioners—not authorized to act on blanket resolution to inspect roads and to receive pay therefor from County Treasury.

(2) County Commissioner cannot accept employment as county road supervisor—employment violates section 5024, Code of Alabama, 1923.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

I have your request for opinion as follows:

"The Commissioners Court of Bibb County for inspecting public roads under a resolution passed by them about two years ago is drawing pay for 15 days each per month and mileage. While they present their claims for inspecting the roads, they are in reality supervisors of roads and bridges in their respective Districts. Please advise if they have the right under the law to this pay and **if they should apoint overseers or supervisors of roads.** A clear opinion from you as to what they are required to do under the law will be appreciated."

I assume from your letter that the Commissioners of your County are acting under a blanket resolution passed by them about two years ago and that the resolution does not authorize specific work to be done at a specific time. If I am correct in my interpretation of the facts presented in your letter, then it is my opinion that the Commissioners of your County have no lawful authority to draw the pay in the manner they are being paid.

This office rendered an opinion November 2, 1928 to the Chief Examiner of Accounts, the opinion being reported in Biennial Reports, 1928-1930, page 65, in which the facts presented were similar to those you present. An opinion was rendered in which it was said that "obviously this provision of the law (Section 6771, Code of 1923) contemplates an order of the Commissioners Court authorizing the specific work at a specific time." In another opinion of this office dated October 14, 1929, Biennial Report for 1928-1930, page 660, in answer to an inquiry which presented a situation similar to yours, this office held that a resolution should be passed authorizing specific work to be done at a specific time. In that opinion reference was made to another opinion of February 20, 1926, to the Judge of Probate of Jackson County (Volume One, Opinion of the Attorney General, 1926, page 96) in which it was held that a commissioner could not be employed as a road supervisor without violating Section 5024 of the Code of Alabama, 1923; also reference was made to another opinion dated November 3, 1927 to the Judge of Probate of Cleburne County (Biennial Report of Attorney General, 1926-1928, page 351) in which it was held that the road supervisor could not employ a Commissioner to superintend road work or to work on the road.

It is, therefore, my opinion that the Commissioners of your County are not authorized to draw any pay for work or services in the inspection or

supervision of roads of your County performed by them pursuant to the blanket order which you mentioned in your letter.

I am further of the opinion that they are not authorized to accept employment from the road supervisor or overseer on the roads of your county and draw pay therefor from the county funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 25, 1937

Hon. E. C. Godfrey,
Sheriff, Sumter County,
Livingston, Alabama.

1. The proper fee allowed by law to the person who furnishes evidence which brings about the conviction of a person in the Circuit Court for unlawfully distilling or manufacturing or making prohibited liquors is $50.00. Section 4626, Code of Alabama of 1923.

2. Section 4626 of the Code of Alabama of 1923 has not been amended.

3. A claim, otherwise proper, for the difference between an amount which has been paid by the State of Alabama less than the $50.00 allowed by Section 4626 of the Code of Alabama of 1923, and the $50.00 there authorized, is a just and legal claim against the State of Alabama.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 13th which follows:

"I desire your opinion on the following of which the facts are outlined below.

"I have presented to the State Board of Administration a claim representing balances due on Distilling fees. In April, 1933, the legislature amended Section 4659 of the 1923 Code which provided a fee of $50.00 upon conviction for having in possession a still, apparatus, appliance, etc. for the purpose of manufacturing prohibited liquors. The Board of Administration construed this amendment to apply also to Section 4626 which provides a fee of $50.00 upon conviction for distilling or manufacturing prohibited liquor. As a result the State Board of Administration paid $35.00 in distilling cases and in some instances only $25.00 was paid.

"Question:

"1—

"Is the proper fee, allowed by law, $50.00 for convictions in distilling or manufacturing liquor cases?

"2—

Has section 4626 of the 1923 Code been amended?

"3—

In view of the facts outlined above, is a claim for balances in distilling or manufacturing liquor a just claim against the State of Alabama?"

Your first question must be answered in the affirmative. The fee allowed by law to the person who furnishes the information which brings about the conviction of a person in the Circuit Court for distilling or manufacturing or making prohibited liquors is $50.00, as provided by Section 4626 of the Code of Alabama of 1923. See opinion to Hon. R. H. Ford, Sheriff, Randolph County, Wedowee, Alabama, under date of March 19, 1934, Biennial Report of the Attorney General, 1932-34, at page 533; opinion of the Attorney General to Hon. R. Jack Gardner, Sheriff, Bibb County, Centerville, Alabama, under date of September 4, 1935, a copy of which is enclosed; and opinion of the Attorney General under date of March 16, 1937, to Hon. Hamp Draper, Associate Member, Board of Administration, Capitol, a copy of which is also enclosed.

The answer to your second question is in the negative. Section 4626 of the Code of Alabama of 1923 was not amended by the 1933 Act to which you refer in your letter of inquiry. The 1933 Act amended Section 4659 of the Code of Alabama of 1923 and did not alter or amend Section 4626 in any manner. See opinions, supra.

If the claim for balances to which you refer is a claim for a difference between an amount which has been paid to you by the State of Alabama less than the $50.00 allowed by Section 4626, supra, and the $50.00 allowed thereby, and is otherwise proper, then my answer to your third inquiry is in the affirmative. Since $50.00 is the proper fee allowed by law for this service, as shown above, a claim for the difference between the amount less than that which has been paid for this service and the amount of $50.00 which is allowed by law, and should have been paid, is a just and legal claim against the State of Alabama, provided the same is otherwise proper. For your information in this regard, I call your attention to an opinion of the Attorney General to Hon. Hamp Draper, Associate Member, Board of Administration, Montgomery, Alabama, under date of December 9, 1935, Quarterly Report of the Attorney General, Vol 1, page 324, which holds that a claim for a balance due in such cases does not have to be certified, provided that the original claim, which was paid only in part, was properly certified as provided by Section 4626 of the Code of Alabama of 1923, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1937

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Section 1744—Code of Alabama, 1923—Municipality—At least four or more qualified electors must reside on each forty acres of land, or fraction thereof, whether platted or unplatted, in order for said land lawfully to be included in a proposed municipal corporation.

Opinion by Assistant Attorney General Simmons.

Dear Sir:

Reference is made to your recent letter in which you submit an inquiry as follows:

"I will thank you to render an opinion on the following section 1744, Code of 1923, just as soon as you possibly can.

"This is the part of the Section that I want an opinion upon:

" 'No platted or unplatted territory shall be included within such boundary unless there are at least four qualified electors residing on each quarter of each quarter section, according to government survey or part thereof, of such platted or unplatted land.'

"Does this mean that there must be at least four qualified electors living on each forty acres of land or on each fractional forty that is included within the boundary of said corporation?"

It is my opinion that any forty acres of land, or fraction thereof, whether platted or unplatted, which has less than four qualified electors residing thereon, cannot lawfully be included in any proposed municipal corporation as authorized by Section 1744, Code of Alabama, 1923. The statute is clear and specific as follows:

"No platted or unplatted territory shall be included within such boundary unless there are at least four qualified electors residing on each quarter of each quarter section, according to government survey or part thereof, of such platted or unplatted land, who assent thereto in writing by signing said petition, together with the consent of the persons, firms or corporation owning at least sixty per cent of the acreage of such platted or unplatted lands, such consent to be signified by their signing this petition."

I am unable to find any law which authorizes the inclusion of a forty of land or a fraction thereof upon which there resides less than four qualified electors. Therefore, you should observe the specific mandate above quoted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1937

Hon. Charles W. Lee,
State Comptroller,
CAPITOL.

Constitutionality—Act No. 376, Senate Bill 381 approved September 9, 1935 (General Acts 1935, page 801) is unconstitutional and void. Said Act, although in the form of a general law, is a local act and was not advertised as is required by Section 106 of the Constitution of 1901.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 8, 1937, which is as follows:

"Please refer to General Acts 1935 page 801—No. 376 (S-381 Swift) and advise me as follows:

"1. Is such Act a Local Act, passed under the guise of a General Act, due to the fact that such Act only applies to Baldwin and Tuscaloosa Counties?

"2. Does such Act violate Section 96 of the Constitution?

"3. Does such Act violate Section 104 Sub-section 24 of the Constitution?"

I am of the opinion that the Act in question is unconstitutional and void as being in violation of Section 106 of the Constitution of 1901. Therefore, it is unnecessary to answer your inquiries as to Sections 96 and 104(24). Said Act although in the form of a general law is a local act and was not advertised as was required by Section 106 of the Constitution of 1901. The Act in question provides as follows:

"Section 1. That the Judge of Probate, the Tax Assessor and the Tax Collector of all counties of this State which now or may hereafter embrace an area of twelve hundred and fifty (1250) square miles or more, may employ, when it is necessary or convenient to the efficient conduct of such offices, more help than is allowed by the provisions of House Bill 324, approved July 10, 1935, when such employment is authorized and approved by the court of County Commissioners or like governing body of such counties, prior to such employment, and duly entered on the minutes of such court.

"Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

"Section 3. This Act shall be effective as of October 1, 1935."

It will be seen from the above that the classification is based on the area of the county to which it is applicable, viz., Counties which embrace an area of 1250 square miles or more. Said Act is applicable only to Baldwin and Tuscaloosa Counties as they are the only counties in the State which have an area of as much as 1250 square miles.

Classification, when made in good faith and reasonably related to the purpose to be effected, and not arbitrarily made, is permissible. Such an Act is considered a general law although it may at the time of its enactment apply to only one or more counties. **Reynolds v. Collins,** 204 Ala. 38; 85 So. 465; However, if an Act applies to only one or more counties and cannot apply to any other counties without future legislation, the classification is bad and such an Act is considered a local act, and the advertisement required by Section 106 of the Constitution is necessary. **State v. Brandon** (M. S.); **Brandon v. Chambers,** 229 Ala. 327, 157 So. 235; **Jefferson County v. Busby,** 226 Ala. 293, 148 So. 411; **Henry v. Wilson,** 224 Ala. 261, 139 So. 259.

Applying the foregoing rule to the instant case, it is apparent that the Act in question is a local act, although in the form of a general law. Said Act is applicable only to Baldwin and Tuscaloosa Counties, of which fact the Court will take judicial knowledge. It can apply to no other county unless the area of some other county is increased to such an extent to come within the application of the Act under consideration. Such an increase in area would require future legislation.

The Act in question, being a local act, was not advertised as was required by Section 106 of the Constitution and is therefore unconstitutional and void.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 29,1937

Hon. J. A. Keller,
Superintendent of Education,
Montgomery, Alabama.

State Department of Education Budget—Department of Education may pay salaries of employees whenever funds are available.

Opinion by Assistant Attorney General Crenshaw.

Dear Sir:

Reference is made to your inquiry as follows:

"Your opinion is desired concerning the method of payment of salaries of members of the State Department of Education. Permit me to present the following facts for your consideration:

"1. On October 22, 1936, the State Board of Education approved the budget for the Department for the fiscal year 1936-37. The resolution adopting the budget and the budget are set out on page ten of the attached copy of the Minutes of the Board. You will note that the Budget was made effective October 1, 1936, and that salaries were budgeted on an annual basis and not monthly. You will further note that I was empowered by resolution of the Board to administer the budget.

"2. The Budget called for a stated annual salary for each employee of the Department but did not require the annual salary to be paid in twelve equal installments. Under normal conditions, I would have divided the annual salary by twelve and paid one-twelfth of the annual salary monthly to each employee. But I did not do this for the following reason: You will note that the resolution of the Board required me to 'so administer the budget that expenditures shall not exceed available funds.' Therefore, I have been actually paying my employees monthly less than one-twelfth of their budgeted salaries. This was desirable in order that I might have the opportunity to study the operation of my budget during the year and ascertain if the available funds were sufficient to pay the salaries as budgeted. The appropriation for the Department is fixed and it is necessary that a careful control be exercised over expenditures in order that I might keep within the budget. There has been no increase in the budget since the drastic cut of 1932. The total budget for the State Department of Education for 1936-37 is the same as for the previous year. The salary adjustments provided in the new budget are made possible only by the strictest economy in travel, supplies, etc. Since the appropriation for the Department is so small it is highly necessary that I watch my budget month by month.

"3. I talked the matter over with the members of my staff and promised that they would be paid the salaries approved in the budget sometime during the year. It now appears that the appropriation available to the State Department of Education will be sufficient to pay the salaries as budgeted. The public schools are provided for. I now desire to pay the employees of the Department the amount that has been withheld for the months of October, November, December, January, and February so that the total amount paid will equal to one-twelfth of the annual salary for each of these months. I am therefore requesting your opinion concerning whether it is within my power to do this.

"I believe that there is no reason why this can not be done but I desire your opinion as a matter of record. Permit me to offer the following reasons in support of my belief that this procedure is in accordance with the law

"1. Section 4 of Act No. 211 approved July 10, 1935, gives the power to the State Board of Education upon the recommendation of the State Superintendent of Education to determine the compensation of all employees in the State Department of Education. Thus, the Lapsley-Lusk salary bill no longer applies to this Department.

"2. The budget of the State Department of Education was adopted by the State Board of Education before the first pay roll was due in the 1936-37 fiscal year. Furthermore, the State Board of Education in a meeting held September 8, 1936, on motion of Mr. Starnes, seconded by Mr. Denson, and unanimously carried, I was authorized to make such staff nominations and salary adjustments of members of the Department of Education, effective October 1, 1936, as in my judgment might be necessary, such action being subject to confirmation by the State Board of Education at a later date, provided said appointments and salary adjustments should not have the effect of increasing the budget of the Department beyond available appropriations. Thus, I was given the power prior to October 1, 1936, to put the new budget into operation for the 1936-37 fiscal year subject to the later confirmation of the Board. This I did and the Board confirmed the budget on October 22, 1936.

"3. The Board of Education adopted a budget calling for annual salaries and did not specify how much was to be paid monthly to each employee. For this reason, I believe that an employee with a budgeted annual salary of $2,400 could be paid $100 per month for the first six months and $300 a month for the last six months, or any other variation in monthly payments which would total $2,400 for the year."

As I understand your letter, the amount of the annual salaries of the employee has been set by the budget adopted by the State Board of Education. You now wish to pay the employees an amount withheld for the months of October, November, December, January and February so that the total amount paid will equal one-twelfth of the annual salary for each of these months.

Since you are required to administer the budget that expenditures shall not exceed available funds, you are vested with a discretion as to how and when the amounts of salaries set by the budget shall be paid. The only limitations on this discretion are that you shall not exceed the amounts set by the budget, and the expenditures shall not exceed available funds.

In my opinion, if funds are now available to pay employees the amounts withheld for the months named, you are authorized to pay the employees such amounts.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 31, 1937

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Instrument confirming new trustee without passing legal title, not subject to deed tax.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your request for my opinion as to whether a certain indenture which you attach to your request is subject to a deed tax. The instrument confirms the appointment of a person who has been appointed as trustee of an estate upon the resignation of the preceding trustee.

I am of the opinion that this instrument is not subject to a deed tax. The trust is already in existence and the property was previously conveyed to the trustee. The former trustee having resigned, the new trustee merely succeeds to his title. "A trust will not be permitted to fail for want of a trustee", and if the original trust agreement had made no provision for a new trustee, the court would have administered the trust or appointed a new trustee.

No consideration has passed in this case and the instrument merely confirms a legal title which already exists.

I am therefore of the opinion that the instrument is not subject to a deed tax. See opinion to Hon. Eugene H. Hawkins, Judge of Probate, Birmingham, Alabama, dated February 3, 1937.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

INDEX

Page

"A"

ACTS: (General and Local)
General Acts of 1919:
Page 187 54
General Acts of 1927:
Page 348, Section 76 142
Page 348, Section 85 161
General Acts of 1931:
Page 557 66
Page 687 88
General Acts of 1933:
Page 81 11
Page 201 ..... 88, 125
Page 203 93
General Acts of 1935:
Page 162 147
Page 194 33
Page 239 28
Page 256 72
Page 604 153
Page 801 173
Page 803 57
Page 950 51
Page 961 101
Page 990 88
Page 1057 10
General Acts of 1936:
Page 3 133
Page 101 93
Page 147 148
Page 217 151
Local Acts of 1878-1879:
Page 248 102
Local Acts of 1880-1881:
Page 498 93
Local Acts of 1882:
Page 300 73
Page 390 22
Local Acts of 1919:
Page 52, 130 79
Page 205 52
Local Acts of 1932:
Page 84 66
Page 124 3
Local Acts of 1933:
Page 37 119
Page 203 66
Local Acts of 1935:
Page 24 113
Page 111 39
Local Acts of 1936:
Page 8 131
Page 53 15
Page 70 95
Page 88 92

INDEX—Continued

Page

ADVERTISEMENTS AND ADVERTISING:
Counties—bids for three trucks—award for one 133

ALABAMA BEVERAGE CONTROL ACT:
Clubs, restaurants and hotels—on premises consumption of liquors required 167
Referendum—voters list—probate judge's duty to make—clerical assistance for making 82

ALABAMA BOYS' INDUSTRIAL SCHOOL:
Insurance premiums on cars and trucks owned by school 66

APPEALS:
Costs for feeding prisoners pending from county court 141
Tax Appeals—apportionment of costs 30

ASSESSMENTS:
Book of—binding by tax assessor 3
Tax assessor—duty to make abstract 7
(See Boards of Review, Property, Taxation)

ATTORNEYS AT LAW:
Barber Commission of Jefferson County—employment by 146
County Board of Education—employment 85
County Board of Education—employment to secure loan 47

AUCTIONEERS:
License—purely personal 145

AUTAUGA COUNTY:
Cost of highway construction—disposition of charge 102

"B"

BALDWIN COUNTY:
General Act with local application to—General Acts, 1935, p. 801, unconstitutional 173

BARBERS:
Jefferson County Commission—no authority to employ attorney 146

BATTERIES:
Licenses—repair shop recharging batteries 62

BLOUNT COUNTY:
Inferior Court—supplies—Judge's duty and fees 81

BOARD OF REGISTRARS:
Compensation—none for illegal session held under mistake of law 27

BOARDS OF REVENUE:
(See Courts of County Commissioners, Counties)

BONDS:
Chief clerk in probate office—payment of premium by county 162
Clerks—duty of probate judge to notify of failure to make 25
Deputy clerks—payment of premium on 66
Discharge of lien against clerk's bond 120
Treasurer of Mobile County 93

INDEX—Continued

Page

BUDGET ACT:
Refunding temporary loans—warrants issued by county for 151
Warrants—only one officer may issue 57

"C"

CHILDREN:
Child Labor—regulation of—extension beyond State boundary 137

CITIES:
(See Municipalities)

CLAIMS:
Contractors—Highway Department paying final estimate as affecting 50
Fine and Forfeiture Fund—clerk's fees as preferred claims against 147
Informer's fees—difference between amount paid and amount due 171

CLERKS:
County court—fees for making transcript on appeal 12
Fees—issuing warrants returnable to county court 12

CLERKS OF CIRCUIT COURT:
Bond—discharge of lien against 120
Bonds—failure to make—probate judge's duty 25
Claims against Fine and Forfeiture Fund as preferred claims 147
Commissioners Court—acceptance of fine and forfeiture claims in settlement of claim against 53
Commissions on moneys transmitted to State 19
Fees—sentencing defendants jointly indicted and separately sentenced 17
Liability to State for garnished fund belonging to former clerk 120
Money of State paid to County by mistake—disposition of 19
Pike County—fees for assistant 52
Preparation of claims against Scottsboro Act—payment 28
Refunding commissions paid to county 53
Saint Clair County—Local Act relative to use of Fine and Forfeiture Fund construed 73

CODE OF ALABAMA, 1923:
Section 231 147
Section 402 82
Section 1744 172
Section 2603 119
Section 3502 137
Section 3667 ..... 60, 104
Section 3739 17
Sections 3753-3754 ..... 17, 59
Section 3815 12
Section 4626 ..... 127, 171
Section 5024 ..... 110, 170
Section 5076 124
Section 6771 ..... 103, 170
Section 9023 63
Section 9593 162
Section 9594 100
Section 9600 115
Section 9604 108
Section 10188 158
Section 10465 ..... 56, 134
Section 10466 56

INDEX—Continued

Page

COMMISSIONERS COURT:
(See Court of County Commissioners, Counties)

CONSTITUTION OF 1901:
Section 106 ..... 92, 173
Section 280 129

CONSTITUTIONALITY:
General Acts, 1935, p. 801, Re: Baldwin and Tuscaloosa Counties, unconstitutional 173
Local Act, DeKalb County, 1936, p. 88, unconstitutional 92
Local Act, 1936, Re: Escambia County Tax Collector, constitutional 131
(See Statutes)

CONTRACTORS:
Bids for three trucks—award for one 133
Employer contracting with Federal Government—liability for employee—contribution 51
Pre-qualification of by President of University of Alabama 33
Time to procure license 21

CONTRACTS:
State Highway Department—paying final estimate—effect on contract for extra work 50

CONVICTS:
Committing magistrate—fees of 17
Convict Department—costs—disposition of where defendant pays up after sentence 19
Convict Department—costs—items in Section 3667 paid only once 104
Costs and fees accruing subsequent to sentence—payment of 60
Costs—disposition of where paid after sentence 19
Costs—payment where defendant sentenced to death and executed 148
Costs where paroled before delivery to State—how paid 148

CORPORATIONS:
Cooperative Farmers Associations—franchise tax and recording fees 153

COSTS:
Accrual of subsequent to sentence—not charge against State 60
Clerk as ex-officio clerk of County Court—issuing warrants 12
Clerk of county court making transcript on appeal 12
Convict Department entitled to fine where defendant sentenced to hard labor 19
Convict Department—items in Section 3667 paid only once 104
Convict paroled before delivery to State—how paid 148
Death sentences—payable from Fine and Forfeiture Fund on 148
Disposition of State money paid to county by mistake 19
Disposition of where defendant pays costs after sentence 19
Execution on—number of 126
Feeding prisoners pending appeal from county court 141
Judges of county court—responsibility for where sentence unlawfully suspended 156
Justice of the peace—acknowledging complaints and issuing warrants 59
Justice of the peace—continuance fee on warrant returnable instanter 155
Nol pros—no authority to tax against defendant 156
Probate court—how due and payable 115
Tax appeals—apportionment on 30
(See Fees, Various Officers)

INDEX—Continued

Page

COTTON:
License—gin company as buyer ... 94

COUNTIES:
Autauga County—payment of cost of highway construction ... 102
Bids on three trucks—award for one ... 133
Bonds—chief clerk in probate office—payment for ... 162
Budget Act—proper officer to issue warrants under ... 57
Budget Act—Warrants refunding temporary loan ... 151
Chairman—office not vacated by temporary illness—salary during absence ... 5
Commissioners Court—member acting as chairman pro tem—liability for payment of illegal claim ... 5
Commissioners pay—supervising road work—sufficiency of order ... 103, 170
Costs in tax appeals ... 30
Cullman County—compensation of members of Board of Finance and Control ... 95
Feed bill of escaped prisoner—liability for ... 130
Fingerprint expert—authority to pay ... 14
Furnishing copy of testimony in habeas corpus proceedings to solicitor—pay for ... 71
Jails—fuel for cooking ... 113
Jails—payment of joint electric bill for jail and private purposes ... 112
Legislators may contract to work for ... 110
Lights and water for sheriff's residence ... 113
Refund to by Board of Education of erroneous disbursements ... 91
Report cards—payment for ... 88
Stationery for solicitor's office—furnishing of ... 108
Tax officials—duty to collect city taxes ... 26
Telephone for solicitor—installation and pay for calls ... 125
Telephones and telephone services—payment of claims for ... 88
Walker County—authority to hire assistant jail guards ... 119
(See Courts of County Commissioners)

COUNTY BOARDS OF EDUCATION:
Attorneys—employment of ... 85
Attorneys—employment to secure loan ... 47
County Custodian of School Funds—pay for service—source of ... 165
County superintendent—authority to grant expense allowance to ... 98
Incidental fees—use of ... 85
Jean Fund—use of ... 85
Matriculation fees—use of ... 85
Property—authority to purchase without condemnation proceedings ... 11
Refund to county for erroneous disbursements ... 91
Report of county board—payment for ... 91
(See Schools)

COUNTY COURTS:
Sheriff's arrest fees—nol prossed or dismissed cases ... 114

COUNTY CUSTODIAN OF SCHOOL FUNDS:
May also be clerical assistant to county superintendent of education ... 75
Pay for services—source of ... 165

COUNTY SUPERINTENDENT OF EDUCATION:
Bond paid from school funds ... 91
Custodian of county school funds may be clerical assistant ... 75
Expense allowance for travelling ... 98

INDEX—Continued

Page

COURT REPORTER:
Habeas corpus proceedings—pay for furnishing transcript of testimony ... 71
Transcript of testimony—duty to furnish solicitor ... 49

COURTS:
Inferior Court, Blount County—judge's duties, fees and supplies ... 81
Inferior Court, Elmore County—office site—installation of phone ... 113
Mobile County Inferior Court—clerk's commissions ... 96
Reporter—furnishing solicitor with transcript of testimony ... 49
Solicitor's fees—disposition of where on salary ... 123

COURTS OF COUNTY COMMISSIONERS:
Chairman—office not vacated by temporary illness—salary during absence ... 5
Contracts made with relatives before appointment to office ... 124
Cullman County—compensation of members of Board of Finance and Control ... 95
Deputy clerk's bond—payment of premium on ... 66
Fine and forfeiture claims—acceptance in settlement of claim against clerk ... 53
Jails—payment of joint electric bill for jail and private purposes ... 112
Judge of Inferior Court—selection of office site and installation of phone ... 113
Member acting as chairman pro tem—liability for payment of illegal claim ... 5
Per diem and mileage of members—sufficiency of order for ... 103, 170
Pike County—authority to pay for assistant clerk ... 52
Randolph County—refunding clerk's commissions ... 53
Report cards—appropriations for ... 88
Road supervisor—member cannot accept employment as ... 170
Sumter County—allowance and issuance of warrants for claims ... 79
Telephone for solicitor—installation and pay for calls ... 125
Telephones and telephone services—payment of claims for ... 88
Treasurer appointed in lieu of county depository—authority to act as clerk of court ... 68
Veterinarian—mileage of assistant ... 37
(See Counties)

CULLMAN COUNTY:
Board of Finance and Control—compensation ... 95

"D"

DEED TAX:
(See Filing Tax)

DEEDS:
Tax deeds—issuance to heir of purchaser at tax sale ... 164

DeKALB COUNTY:
Local Act, 1936, p. 88, unconstitutional ... 92

"E"

ELECTIONS:
Board of Registrars—no compensation for illegal session ... 27
Disqualification of voter—convicted of Federal offense—effect of naturalization on ... 84

INDEX—Continued

Page

Liquor Referendum—poll list—probate judge to make—clerical assistants ... 82
Poll tax—exemptions of disabled persons ... 70
(See Poll Tax, Registration, Voters)

ELECTRIC MEMBERSHIP CORPORATION:
Filing tax—liability for ... 76

ELMORE COUNTY:
Judge Inferior Court—selection of office site and installation of phone ... 113

ESCAMBIA COUNTY:
Local Act, 1936, p. 8, constitutional ... 131
Tax collector—disposition of taxes collected under Local Act, 1936, p. 8 ... 131

EXECUTIONS:
Alias—sheriff's authority under ... 126
Judgments—number issued on ... 126

EXEMPTIONS:
Blind person—on undivided interest in realty ... 130
Gas tax—State Armory Commission ... 89
Poll tax—disabled persons ... 70
Real estate owned by Masonic Lodge ... 72
Veterans—flying jenny license ... 136
Veterans license—failure to make proof of disability ... 10
(See Licenses, Taxation)

"F"

FEES:
Accrual of subsequent to sentence—not charge against State ... 60
Clerk as ex officio clerk of county court—issuing warrants ... 12
Clerk—as preferred against fine and forfeiture fund ... 147
Clerk circuit courts—sentencing defendants jointly indicted and separately sentenced ... 17
Clerk—commissions on moneys transmitted to State ... 19
Clerk of county court making transcript on appeal ... 12
Clerk Pike County—assistant ... 52
Committing magistrate's twenty-five cents fee ... 17
Convict Department pays each item in Section 3667 once ... 104
Fishing license—issuance of ... 148
Highway patrolmen serving license citations ... 108
Informer's fees—claims for balance due ... 171
Informer's fees—securing conviction of liquor manufacturers ... 127, 171
Justices of peace—acknowledging complaints and issuing warrants in nol prossed or not guilty cases ... 59
Justices of Peace—continuance fee on warrant returnable instanter ... 155
License inspectors—15% of delinquent license ... 108
License inspectors—when entitled to ... 108
Register in Chancery—disposition of uncalled for witness fees ... 134
Probate judges—celebrating rights of matrimony ... 140
Probate judges—making monthly settlement with license inspectors ... 32
Seizure fees in prohibition cases—disposition of in Tuscaloosa County ... 15
Sheriff's arrest fees in nol prossed or dismissed cases ... 114
Sheriffs—arresting felon later convicted of misdemeanor ... 17
Sheriff's guard and jail fees—misdemeanor cases where no conviction ... 163

INDEX—Continued

Page

Sheriffs issuing warrants for defendant charged with one or more offenses where no conviction 163
Sheriffs serving grand jury witnesses where defendant acquitted, prosecution abated or nol prossed 105
Sheriffs serving grand jury witnesses where no indictment found 105
Solicitors—disposition of where on salary 123
Tax assessor—collecting taxes for City of Auburn 39
Tax Assessor, Tuscaloosa County 10
Tax Collector—collecting taxes for City of Auburn 39
Uniform Firearms Act—none for issuance of license 116
Witnesses in two or more cases before grand jury 44
Witnesses—mileage of non-resident paid from State line 107
Witnesses—State employees 17
(See Costs, Fine and Forfeiture Fund, Various Officers)

FILING TAX:

Agreement conveying no interest in real or personal property 8
Cooperative Farmers Association—liability for 153
Deed by executor conveying legal title to trustees to carry out testator's will 106
Deed by individual to United States 26
Deed given for perfecting title, without consideration 46
Deed given in lieu of foreclosure 136
Electric Membership Corporation—liable for 76
Instrument confirming new trustee without passing legal title 177
Instrument conveying partnership property to individual partners 143
Instrument executed for perfecting title 17
Long term lease—calculation of amount 135
Long term lease—deduction of recorded mortgage 135
Options 29

FINE AND FORFEITURE FUND:

Convict paroled before delivered to State—costs paid from 148
Costs—payment where defendant sentenced to death and executed 148
Mobile County Inferior Court—clerk's commission for collection 96
Preferred claims against—clerk's fees as 147
Saint Clair County—Local Act relative to construed 73
Saint Clair County—payable in scrip 22
Sheriff's arrest fees in nol prossed or dismissed cases 114
Sheriff's fees—issuing warrant for defendant charged with one or more offenses where no conviction 163
Sheriff's guard and jail fees—misdemeanor cases where no conviction had 163
(See Costs, Fees)

FINES:

Failure to stop in event of accident—disposition of 142
Veterans licenses—failure to make proof of disability 10

FIREWORKS:

License—party selling blank metallic ammunition 78

FRANCHISE TAX:

Cooperative Farmers Associations 153

FUNDS:

Discharge of lien against in clerk's hands 120
Fiduciary funds on hand five years—disposition of 56

INDEX—Continued

Page

"G"

GAME AND FISH:
Fishing license—officer's fee for issuing ... 148

GASOLINE:
Tax—State Armory Commission's liability for ... 89

GENERAL ACTS:
(See Acts)

GUARDIAN AND WARD:
Child labor—permitting infant to work in Georgia ... 137

"H"

HABEAS CORPUS:
Payment for copy of testimony furnished solicitor ... 71

HARDWARE DEALERS:
Licenses—selling electrical supplies ... 65

HENRY COUNTY:
Assessment book—tax assessor's duty to make ... 3

HIGHWAYS AND HIGHWAY DEPARTMENT:
Autauga County—payment for cost of highway construction ... 102
Commissioners Court—sufficiency of order authorizing pay for supervisor ... 103, 170
Failure to stop in event of accident—disposition of fine ... 142
Highway patrol officer—citation fee for serving delinquent ... 108
Paying final estimate on contract—effect on contract for extra work ... 50
Road supervisor—county commissioner cannot accept employment as ... 170
Semi-trailer—employees as passengers on ... 161
(See Motor Carriers, Motor Vehicles)

"I"

INFERIOR COURTS:
Blount County—judge's duties, fees and supplies ... 81
Elmore County—office site—installation of phone ... 113
Mobile County—clerk's commission for collection of fine and forfeiture ... 96
Solicitor's fees—disposition of where on salary ... 123

INSURANCE:
Alabama Boys' Industrial School—premiums on motor vehicles owned by school ... 66

INTEREST:
Redemption from State by individual—amount of ... 39

INTOXICATING LIQUORS:
Informer's fees—claims for balance due ... 171
Informer's fees—securing conviction of liquor manufacturers ... 127, 171
Hospitals, restaurants and clubs on premises consumption required ... 167
(See Alabama Beverage Control Act)

INDEX—Continued

Page

"J"

JACKSON COUNTY:
Scottsboro Relief Act—cannot pay clerk for preparation of claims from ... 28
Scottsboro Relief Act—cannot pay wounded Morgan County sheriff from ... 28

JAILS:
Electricity—payment for, where used jointly for jail and private purposes ... 112
Fuel for cooking ... 113
Lights and water for sheriff's residence—furnishing of ... 113
Marshall County jail guard—salary and term of office ... 158
Walker County—assistants to day and night guard ... 119

JEFFERSON COUNTY:
Barber Commission—attorney no authority to employ ... 146
Deputy clerk—payment of premium on bond ... 66
Feeding prisoners pending appeal from county court ... 141

JUDGES:
County court—entering nol pros—taxing costs against defendant ... 156
County court—unlawfully suspending sentence—liability for costs ... 156

JUDGES OF PROBATE:
Application for redemption on installment plan—acceptance of ... 154
Bond of chief clerk—payment of premium by county ... 162
Bonds—notification of appointing power when clerk fails to make ... 25
Contracts with relatives prior to appointment ... 124
Costs in probate court—how due and payable ... 115
Fees—celebrating rights of matrimony ... 140
Fees—making monthly settlement with license inspector ... 32
Fiduciary funds on hand for five years—disposition of ... 56
Fingerprint expert—hire of to trace theft ... 14
Liability in event of robbery of office ... 14
Liquor Referendum—making poll list—clerical assistance ... 82
Mortgage—attestation necessary to valid satisfaction ... 63
Tax deed—issuance to heirs of purchaser at tax sale ... 164
Vacancy in office—chief clerk to perform duties ... 100

JUDGEMENTS:
Executions—number issued on ... 126

JURIES AND JURORS:
Russell County Jury Commissioner—expiration of term ... 129

JUSTICES OF THE PEACE:
Continuance fee on warrant returnable instanter ... 155
Fees—acknowledging complaints and issuing warrants in nol prossed or not guilty cases ... 59

"L"

LABOR:
Children—extension of regulation beyond State boundary ... 137

LEE COUNTY:
Tax collector and tax assessor—compensation from City of Auburn ... 39

INDEX—Continued

Page

LEGISLATURE:
Members—contracts of employment with county 110

LICENSE INSPECTORS:
Citation fees—citations served by officer other than—delinquent penalties 108
Fees—when entitled to 108
(See Licenses)

LICENSE TAGS:
Motor vehicles—issuance on monthly declining basis 97
Place of purchase—individual buying second hand car 137

LICENSES:
Auctioneers—license purely personal 145
Automobile dealers—selling accessories by truck over State 165
Cotton buyer—gin company as 94
Electrical supplies—store selling bulbs and lamps 77
Fireworks—sale of blank metallic ammunition 78
Fishing—officer's fee for issuing 148
Flying jenny—veterans' exemption from 136
Hardware store selling electrical supplies 65
Motor vehicles—issuance on monthly declining basis 97
Newsstands selling magazines and/or periodicals 144
Repair shop recharging batteries 62
Rolling stores entitled to one-half year 78
Rolling stores—required in each county where doing business 149
Uniform Firearms Act—no fee for issuance 116
Veterans' exemptions—failure to make proof of disability 10
(See Taxation)

LIEN:
Discharge of against clerk's bond 120

LOCAL ACTS:
(See Acts)

"M"

MARRIAGE:
Fee—probate judge celebrating rights of matrimony 140

MARSHALL COUNTY:
Chief deputy sheriff—term of office and salary 158
Jail guard—term and salary of 158

MOBILE COUNTY:
Inferior Criminal Court Clerk—commission for collection of fines and forfeitures 96
Treasurer—bond of 93

MORGAN COUNTY:
Sheriff's arrest fees in nol prossed or dismissed cases 114
Sheriff's medical expenses not paid from Scottsboro Act 28

MORTGAGES:
Satisfaction—attestation required 63

MOTOR VEHICLES:
License tags—issuance on monthly declining bases 97

INDEX—Continued

Page

License tags—where purchased by second hand car owner 137
Semi-trailers—employees as passengers on 161
(See Highways, Highway Department)

MUNICIPAL CORPORATIONS:
Incorporation of—number of resident electors necessary 172
Number of electors necessary to include territory within boundary of 172
Taxes—assessment and collection by county officers mandatory 26

"N"

NEWSSTANDS:
License—selling magazines and/or periodicals 144

"O"

OFFICERS:
Appointing officer—changing salary and term of employee 158
Bond of deputy clerk—payment of premium on 66
Budget Act—issuance of county warrants under 57
Chairman—office not vacated by temporary illness—salary during absence 5
Commissioners Court—member acting as chairman pro tem—liability for payment of illegal claim 5
Contracts with relatives prior to holding county office 124
County tax officials—duty to collect city taxes 26
Judges of probate—vacancy filled by chief clerk 100
Tax collector—loss of funds through burglary—liability for 116
Treasurer appointed in lieu of depository—authority to act as clerk of commissioners court 68
Treasurer of Mobile County—bond of 93
(See Various officers)

"P"

PIKE COUNTY:
Clerk of Circuit Court—pay for assistant 52

POLL TAX:
Exemptions of disabled persons 70
(See Elections, Registration, Voters)

PRISONERS:
Feed bill of escaped prisoners—county's liability for 130
Feeding pending appeal from county court 141
Food—fuel for cooking 113

PROPERTY:
Donated to State for schools—reversion of 54
Exemptions from taxation of Masonic Lodge 72
Purchase of by County Board of Education 11
Redemption on installment plan—time for filing application 154
Tax exemption—blind person on undivided interest 130
(See Redemption, Taxation)

"R"

RANDOLPH COUNTY:
Commissioners Court—refunding clerk's commissions 53

REDEMPTION:
Installment plan—time for filing application 154

INDEX—Continued

Page

Interest—from State by individual 39
Tax sales—purchaser entitled to deed 31
(See Property, Taxation)

REGISTER IN CHANCERY:
Fiduciary funds—disposition of uncalled for witness fees 134

REGISTRATION:
Board of registrars—no compensation for illegal session held under mistake of law 27
Voters disqualified by conviction of Federal offense—effect of naturalization on 84
(See Elections, Poll Tax, Voters)

REVENUE LAWS:
Acts of 1935:
License Schedule (Section 348, p. 441):
Schedule 11 145
Schedule 13 62
Schedule 20 62
Schedule 42 21
Schedule 43 94
Schedule 46 ..... 8, 76
Schedule 56 ..... 65, 77
Schedule 63 78
Schedule 94 8
Schedule 99 144
Schedule 146 ..... 78, 149
Schedule 147 165
Schedule 158.1 97
Schedule 158.13 97
Sections 55, 57, 58 ..... 3, 7
Section 201 26
Section 365 32
(See Licenses, Taxation)

ROADS AND BRIDGES:
(See Highways, Highway Department, Gasoline, Motor Vehicles)

ROLLING STORES:
Licenses—one-half year 78
Licenses—required in each county where doing business 149

RUSSELL COUNTY:
Jury Commissioner—expiration of term 129

"S"

ST. CLAIR COUNTY:
Fine and forfeiture fund—Local Act relative to construed 73
Fines and forfeitures payable in scrip 22

SCHOOL CODE OF 1927:
Section 132 11
Section 387 54

SCHOOLS:
Alabama Boys' Industrial School—insurance premiums on motor vehicles owned by 66
Attorney—employment by County Board of Education 85

INDEX—Continued

Page

Attorney—employment by County Board of Education to secure loan 47
Band instruments and other supplies—purchase of 85
Bond of county superintendent of education—payment for 91
Contractors—pre-qualification of by President of University of Alabama 33
County superintendent of education—expense allowance 98
Custodian of county school funds—may also be clerical assistant to county superintendent of education 75
Custodian of county school funds—pay for services—source of 165
Incidental fees—used to pay for school equipment, supplies and secretarial salary 85
Jean Fund—use of 85
Lands donated to State for schools—reversion of 54
Matriculation fees—used to pay for secretarial salary, school equipment and supplies 85
Pistol permit for night watchman—Alabama College 142
Property—purchased by county board of education 11
Report cards—payment for by county 88
Reports and statement of receipts and disbursements—payment for 91
State Department of Education Budget—payment of employees' salaries 175

SHERIFFS:

Alias execution—authority under 126
Arrest fees—nol prossed or dismissed cases in Morgan County Court 114
Fees—arresting felon later convicted of misdemeanor 17
Fees—serving grand jury witnesses where defendant acquitted, prosecution abated or nol prossed 105
Fees—serving grand jury witnesses where no indictment found 105
Fees—warrants for defendant charged with one or more offenses where no conviction 163
Guard or jail fees—warrant based on affidavit where no conviction 163
Informer's fees—securing conviction of liquor manufacturers 127, 171
Jefferson County—feeding prisoners pending appeals from county court 141
Lights and water for residence 113
Marshall County deputy—term of office and salary 158
Medical expenses—wounded Morgan County Scottsboro Deputy 28
Seizure fees in prohibition cases—disposition of in Tuscaloosa County 15

SOLICITORS:

Copy of testimony in habeas corpus proceedings—payment for 71
Fees—disposition of where on salary 123
Stationery—county without authority to furnish 108
Telephone—installation and pay for calls 125
Transcript of testimony—duty of court reporter to furnish to 49

STATE:

Costs in tax appeals 30

STATE ARMORY COMMISSION:

Gasoline tax—liability for 89

STATE BOARD OF EDUCATION:

Salaries of employees—effect of budget on payment 175

STATUTES:

General Acts, 1935, p. 801—unconstitutional as Local Act in form of general law 173

INDEX—Continued

Page

Henry County—Section 2 of Local Act relative to assessment books repealed ... 3
Local Act, DeKalb County, 1936, p. 88, unconstitutional ... 92
Local Act, 1936, Escambia County, regarding tax collector constitutional ... 131
(See Constitutionality)
SUMTER COUNTY:
Claims against—allowance of and issuance of warrants for ... 79

"T"

TAX ASSESSORS:
Abstracts—duty to make ... 3, 7
Fees—collecting taxes for Auburn ... 39
Original assessment sheets—binding of ... 3
Tuscaloosa County—fees from October 1, 1935, to January 1, 1936 ... 9

TAX COLLECTORS:
Fees—collecting taxes for Auburn ... 39
Loss of funds through burglary—liability for ... 116

TAX SALES:
Deed to purchaser ... 164

TAXATION:
Book of assessment—binding of ... 3
Exemptions—real estate owned by Masonic Lodge ... 72
Exemptions to blind on undivided interest in realty ... 130
Franchise tax—Cooperative Farming Associations ... 153
Gasoline tax—State Armory Commission's liability for ... 89
License tags—where purchased by second hand car owner ... 137
Municipal corporations—mandatory for county officials to collect taxes of ... 26
Poll tax—exemptions of disabled persons ... 70
Redemption—interest—from State by individual ... 39
Redemption on installment plan—time for filing application ... 154
Tax appeals—apportionment of costs ... 30
Tax deed—issuance to heirs of purchaser at tax sale ... 164
Tax sales—deed to purchaser ... 31
Tuscaloosa County Tax Assessor—compensation ... 9
(See Filing Tax, Gasoline, Licenses, Redemption, Tax Sales)

TRAILERS:
Semi-trailer—employees of truck owner riding on ... 161

TRANSIENT DEALERS:
Automobile dealer selling accessories by truck over State ... 165
(See Peddlers)

TREASURER, COUNTY:
Authority to act as clerk of commissioners court ... 68
Mobile County—bond of ... 93

TUSCALOOSA COUNTY:
General Act with local application to—General Acts, 1935, p. 801, unconstitutional ... 173
Seizure fees in prohibition cases—disposition of ... 15
Tax assessor—fees from October 1, 1935, to January 1, 1936 ... 9

INDEX—Continued

Page

"U"

UNEMPLOYMENT COMPENSATION LAW:
"Agricultural Labor"—definition of in rules must conform to general law 101
Crude turpentine gum gatherers and processors 111
Employer contracting with Federal Government—liability for employee—contribution 51
Rules and regulations—cannot conflict with general law 101

UNIFORM FIREARMS ACT:
License—no fee for issuance 116
Night watchman for Alabama College—pistol permit required 142

UNIVERSITY OF ALABAMA:
Contractors—President's authority to pre-qualify 33

"V"

VETERANS:
Exemption on flying jenny license 136
Exemptions—failure to make proof of disability 10

VETERINARIANS:
Mileage—no authority for county to pay 37

VOTERS:
Disqualification—convicted of Federal offense—effect of naturalization on 84

"W"

WALKER COUNTY:
Jails—assistants to day and night guards 119

WARRANTS:
Budget Act—proper officer to issue warrants under 57
Clerks of county courts—fees for issuing 12
Refunding temporary loans 151
Sumter County—issuance for claims against 79

WITNESSES:
Employees of State—fees before grand jury 17
Fees—disposition of where uncalled for 134
Fees of sheriffs serving grand jury witnesses where defendant acquitted, prosecution abated or nol prossed 105
Fees—two or more cases before grand jury 44
Mileage of non-resident paid from State line 107
Sheriff's fees where no indictment found 105

WORDS AND PHRASES:
"Agricultural Labor" 101, 111
"Principal business" 94